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1. Chronological List of Dates of Pleadings, Hearings, Orders, etc.

A. The Original Trial and Direct Appeals

1. **April 17, 1964** – Discovery of bodies of three murdered policemen.
2. **August 23, 1965** – Indictment of Evans for the murder of one of the police officers.
3. **October 18-21, 1965** – Trial of Evans in the Gwinnett County (Georgia) Superior Court.
4. **October 21, 1965** – Return of "guilty" verdict by jury and sentence of the trial court.
5. **July 7, 1966** – Judgment of trial court affirmed by the Supreme Court of Georgia.
6. **November 14, 1966** – Denial of Certiorari by the Supreme Court of the United States.

B. The Present Habeas Corpus Proceeding

1. **December 14, 1966** – Application of Appellee Evans to the United States District Court for the Southern District of Georgia for a Writ of Habeas Corpus.
2. **December 14, 1966** – Order of the United States District Court for the Southern District of Georgia, directing Appellant, A. L. Dutton, Warden, Georgia State Prison, to make his return and show cause why the application should not be granted.

3. **December 30, 1966** – Return of Appellant Dutton filed.

4. **April 25, 1967** – Hearing before the United States District Court for the Southern District of Georgia.

5. **May 1, 1967** – Order of the United States District Court for the Southern District of Georgia transferring the case to the United States District Court for the Northern District of Georgia.

6. **May 19, 1967** – Hearing before the United States District Court for the Northern District of Georgia.

7. **September 6, 1967** – Order of the United States District Court for the Northern District of Georgia denying Appellee Evans' application for a Writ of Habeas Corpus.

8. **September 6, 1967** – Judgment entered by the United States District Court for the Northern District of Georgia in favor of Appellant Dutton and against Appellee Evans.

9. **May 9, 1968** – Hearing before the United States Court of Appeals for the Fifth Circuit.

10. **September 16, 1968** – Opinion of the United States Court of Appeals for the Fifth Circuit reversing the decision of the United States District Court for the Northern District of Georgia.

11. **September 16, 1968** – Judgment of the

United States Court of Appeals for the Fifth Circuit reversing the judgment of the United States District Court for the Northern District of Georgia.

12. **September 26, 1968** – "Notice of Appeal" to the Supreme Court of the United States filed by Appellant Dutton in the Court of Appeals.

13. **December 13, 1968** – Jurisdictional Statement filed in the Supreme Court of the United States by Appellant Dutton.

14. **February 24, 1969** – Probable jurisdiction noted by the Supreme Court of the United States.

2. Relevant portions of Appellee Evans' "Application for Writ of Habeas Corpus," filed in the United States District Court for the Southern District of Georgia on December 14, 1966.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA ex rel. ALEX S. EVANS v. A. L. DUTTON, WARDEN of the State Prison at Reidsville, Georgia	CIVIL ACTION NO. 2072

APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE FRANK SCARLET, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA:

The petition of Alex S. Evans respectfully shows this Court the following facts:

-1-

Petitioner is unlawfully imprisoned and detained by A. L. Dutton, Warden of the State Prison at Reidsville, Georgia.

-2-

Petitioner is unlawfully imprisoned and detained by the said A. L. Dutton under and by virtue of a judg-

ment, sentence and order passed by the trial judge of the Gwinnett Superior Court.

-3-

Petitioner was indicted, tried and convicted of the offense of murder without a recommendation of mercy by the jury in Gwinnett Superior Court. The said verdict was entered on October 21, 1965 and petitioner was sentenced to death by electrocution on October 21, 1965 by the trial judge.

-4-

Petitioner has appealed to the Georgia Supreme Court and the decision of the trial court was affirmed on July 7, 1966. A motion for rehearing was denied by the Georgia Supreme Court on July 21, 1966. The Supreme Court of the United States denied certiorari on November 14, 1966. Petitioner has exhausted his state remedies. Copies of the opinions rendered by the Georgia Supreme Court are attached hereto and marked Exhibit "A" and made a part hereof.

-5-

The facts and law relied upon by petitioner in bringing this application will be fully set out herein but petitioner's basic contention is that he is unlawfully detained because fundamental rights granted him by the Constitution of the United States have been violated.

The indictment on which Petitioner was tried and convicted was returned by the Grand Jury of Gwinnett County, Georgia, as a true bill on August 24, 1965. This indictment was one of a series of indictments growing out of the murder of three Gwinnett County police officers which occurred on April 19, 1964. It charged Peti-

tioner jointly with Venson Eugene Williams with the murder of officer Jerry S. Everett. In all, nine indictments had been returned by this Grand Jury. Three were returned on July 1, 1965, charging three defendants, Petitioner, Williams and Wade L. Truett, with the murder of each of the three officers. Three were returned on August 24, 1965, again charging all three defendants with the murder of each of the three officers. On the same date, the Grand Jury returned three additional indictments, charging only Petitioner and Williams with the murder of each of the three officers.

Indictment No. 7284, in which only Petitioner and Williams were charged with the murder of Officer Everett was scheduled by the State for initial prosecution. Trial of Petitioner on this indictment followed a week after the trial of Williams on the same indictment. Prior to arraignment and trial, Petitioner filed several motions, including motion for severance. This motion was granted. In addition, he filed a motion to produce and divulge information and motion to produce certain documents. These motions were overruled. In the selection of the trial jury, defendant objected to the disqualification of jurors who stated on voir dire that they were conscientiously opposed to capital punishment. He further objected to the placing on him as a juror one Hubert H. Higgins, for the reason that said juror would not state that his verdict would not be affected by his relationship to one of the deceased officers.

During the course of the trial, the testimony of one Lynwood Shaw was offered by the State and admitted over objection of Petitioner with respect to a statement made to him by co-defendant Williams. Wade L. Truett,

a co-defendant, was offered as a witness by the State. Prior to the introduction of his testimony, Petitioner filed a written motion and made an oral motion to exclude the testimony. These motions were likewise overruled. In the process of this witness' testimony, it was revealed that he made a statement which was recorded by tape recording and also a written statement. An oral motion to require the State to produce this testimony for examination by the defense was overruled.

Petitioner was placed on trial on October 18, 1965, and the verdict, without recommendation of mercy, was returned October 21, 1965. The death sentence was imposed on the same date. A motion for new trial was timely filed and thereafter the same was overruled on May 1, 1965. Subsequent appellate proceedings and the results thereof are stated under Section (b) above. Petitioner hereinafter specifies the stages in the proceedings in the court of the first instance and in the Appellate Court and in which manner the questions sought to be reviewed were raised, the method of raising them and the way in which they were passed upon by the courts. Pertinent quotations of portions of the records will be supplied.

* * *

During the course of the trial, Lynwood W. Shaw was called as a witness (R. pp. 129-163). As Shaw had testified at the earlier Williams' trial, Petitioner's counsel could anticipate his testimony. Accordingly when the witness was asked by the prosecutor about a conversation which had transpired between the witness and Williams, Petitioner objected in the following language:

"MR THOMPSON: If it please the Court, we

object to any conversation had between this witness and Williams, any other party out of the presence of the defendant as being hearsay.

THE COURT: Objection overruled.

MR. THOMPSON: If it please the Court, we have a further objection, we would like to make and feel probably should be made out of the presence of the jury.

THE COURT: I will ask you to retire to your Jury Room, Gentlemen. All right, state your objection.

MR. THOMPSON: If it please the Court, we object to this witness testifying as to any conversation had with the defendant Williams out of the presence of the defendant on the grounds that such evidence such testimony would be hearsay, that this defendant is entitled to be confronted with the witnesses who testify against him under the provisions of the United States Constitution and under the Constitution of the State of Georgia, and to permit this witness to testify as to what somebody else told him would be in substance to permit the testimony of another witness or another party to testify through this man's lips and to deny the defendant the right of confrontation guaranteed by Article 1, Paragraph 5 of the Constitution of the State of Georgia of 1945, Georgia Code Section 2-105 and of the Constitution of the United States, Sixth Amendment, Section 1-806 of the Code. We are aware of the fact there is a statute of the State of Georgia which provides, that is Georgia Code Section 38-308 – 306, which provides that after the fact of conspiracy shall

be proved the declarations by any one of the conspirators during its pendency of the crime the criminal project shall be admissible against all. We submit that if the Statute is construed by this Court to permit hearsay testimony under the circumstances present here, that it would be a violation of the two sections of the Constitution that we have referred to above. Just one moment.

If it please the Court –

THE COURT: Anything further in your motion?

MR. THOMPSON: Yes, sir, further objection, we urge that in order for a – statement ex parte, that is hearsay statement, that is a statement made out of the presence of the defendant to be admissible against the other defendant on trial, the same must be made during its pendency of the conspiracy and in furtherance of the conspiracy. Now, on the three grounds that we have stated, we submit that the testimony that this witness is about to give is not admissible and perhaps in some respect, our objection and motion might be premature, but we submit if the witness is permitted to testify as we anticipate, he will – having heard his testimony on the prior trial, it will be so prejudicial – it will so prejudice the minds of the Jury that to make an objection subsequently and to make these objections, I should say subsequently, would be of little avail even though the Court should sustain them and would withdraw the testimony or the evidence from the Jury's consideration. So we are making this motion at this time prior to the introduction of the testimony. . . ." (R. 141-143)

• • •

"THE COURT: Gentlemen, the Court is ready to rule on the thing. I don't want to cut off further argument, the motion is in the record. It is the opinion of the Court that the conspiracy prima facie has been established by the testimony in this case and it now becomes a question of the Jury and the Court must submit it to the Jury the question whether or not the conspiracy has or has not been established, and if the Jury should find a conspiracy has been established, then the testimony or statements or acts of any one connected with the conspiracy during its continuance, before or concealment after the crime, I think would be admissible against all who participated therein. The Court therefore overrules your objection, Mr. Thompson, and will allow the answer." (R. 147-148)

Following this ruling of the Court, the witness Shaw was permitted to testify that he had had a conversation with Williams following the latter's arraignment on the murder charge in Gwinnett County. He testified further:

"Q. Asked him — speak a little louder.

A. I went to his room in the hospital and asked him how did he make out in Court.

Q. Asked him how did he make out in Court?

A. How did he make out in Court.

Q. What was his response?

A. He said, 'if it hadn't been for that dirty-son-of-a-bitch, Alex Evans, we wouldn't be in this now.' " (R. 148)

Following the above testimony, Petitioner renewed

the objection previously made and moved the Court to exclude the testimony quoted above. The Court overruled these motions. (R. 149).

* * *

-6-

Petitioner was denied due process of law on the record hereinbefore recited for the reasons:

* * *

(e) He was denied confrontation and the right to cross-examine a witness whose testimony was used against him, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and as guaranteed him under Article I, Paragraph V of the Constitution of the United States. (Brookhart v. Janis, ... U.S. .....; 16 LEd2d 314).

(f) There was permitted to be used against him at the trial hearsay testimony of an alleged co-conspirator, admitted in evidence pursuant to Ga. Code Section 38-306, which Code Section, as applied in this case, is unconstitutional and violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

* * *

-7-

By reason of each of the foregoing grounds, and all of them collectively, the conviction, sentence and imprisonment of Petitioner as aforesaid are unlawful and in violation of the Constitution of the United States of America.

WHEREFORE, Petitioner prays that a writ of habeas corpus issue to the said A. L. Dutton, Warden of the State of Georgia Prison at Reidsville, Georgia, requiring him to produce the body of your petitioner before this court at some convenient time to be therein designated, there to abide what shall be awarded by the court in the premises, and that Petitioner be discharged from said imprisonment; that a stay of execution be granted by this court pursuant to 28 USC 2251; and that the stay of execution remain in force throughout the proceeding in this Court and throughout any appeal that may lie from the decision of this Court.

Respectfully submitted,

P.O. Box 679
Gainesville, Ga.

/s/ ROBERT B. THOMPSON

ROBERT B. THOMPSON

/s/ E. C. BRANNON, JR.

E. C. BRANNON, JR.

Attorneys for Petitioner

(Jurat and Opinion of the Supreme Court of Georgia attached as Exhibit "A" to Application omitted in printing)

3. Order of the United States District Court for the Southern District of Georgia dated December 14, 1966, directing Appellant Dutton, Warden, Georgia State Prison, to make his return and show cause why the Writ of Habeas Corpus should not be issued.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA ex rel. ALEX S. EVANS vs. A. L. DUTTON, WARDEN, GEORGIA STATE PRISON, REIDSVILLE, GEORGIA.	CIVIL ACTION NO. [illegible]

ORDER

Good cause appearing therefor, and upon reading the verified petition in the above stated case, and after due deliberation thereon, it is upon consideration,

ORDERED that the Respondent make his return and show cause within twenty (20) days from the date on which this Order is filed with the Clerk, pursuant to the provisions of 28 U.S.C. 2243, why a Writ of Habeas Corpus should not be issued herein, as prayed for; and

FURTHER ORDERED that, in compliance with this Order to show cause, the Respondent make his return as directed above and include therein any affidavits, court records, or other documents showing why the Writ

of Habeas Corpus should not be issued, together with a proposed order in the matter; and

FURTHER ORDERED that the Respondent retain custody of the Petitioner until further order of this Court; and

FURTHER ORDERED that the Clerk of this Court serve copies of this Order, together with a copy of the petition, on the Petitioner, the Respondent, and the Attorney General of the State of Georgia, as Counsel for the Respondent.

This 14th day of December, 1966.

/s/ F. M. SCARLETT

F. M. SCARLETT
United States District Judge

4. Return and Answer of Appellant Dutton filed on or about December 30, 1966 (excluding exhibits).

(Title omitted in printing)

RETURN AND ANSWER

Comes now A. L. DUTTON, Warden of the Georgia State Prison at Reidsville, Georgia, respondent in the above-styled case, and makes this his Return and Answer to the Petitioner's Application for Writ of Habeas Corpus, showing the Court as follows:

FIRST DEFENSE

The Petitioner is not entitled to the writ because his Application does not present any substantial federal question for determination by this Court.

SECOND DEFENSE

The Petitioner is not entitled to the writ because he has failed to state a claim against Respondent upon which relief can be granted.

THIRD DEFENSE

The Petitioner is not entitled to the writ because of the following facts and circumstances:

1. The merits of the factual disputes and contentions upon which Petitioner relies in his averments that various rights secured to him by the United States Constitution have been violated were resolved during the state court proceedings;

2. The state factual determinations are fairly supported by the record as a whole;

3. The fact-finding procedure employed by the state court was adequate to afford a full and fair hearing;

4. There is no allegation of newly discovered evidence;

5. The material facts were adequately developed during the state court proceedings; and

6. It does not appear, for any reason, that the state court proceedings in which the facts were developed did not afford Petitioner a full and fair hearing.

In support of this defense, Respondent, at the time of the hearing on Petitioner's Application for Writ of Habeas Corpus, will tender into evidence the complete transcript of the state court proceedings.

FOURTH DEFENSE

Respondent answers the specific factual allegations set forth in Petitioner's Application for Writ of Habeas Corpus as follows:

1. Respondent admits the allegation of paragraph one of the Application that Petitioner is imprisoned and detained by Respondent but denies that such imprisonment and detention is "unlawful."

2. Respondent admits the allegation of paragraph two of the Application that Petitioner's imprisonment and detention by Respondent is by virtue of a judgment, sentence and order passed by the trial judge of the Gwinnett Superior Court, but denies that such imprisonment and detention is "unlawful."

3. Respondent admits the allegations of paragraph three of the Application.

4. Respondent admits the allegations of paragraph four of the Application and further shows the Court that the opinion of the Supreme Court of Georgia is set forth in the official reports as *Evans v. The State,* 222 Ga. 392 (1966).

5. Paragraph five of the Application covers approximately thirty pages thereof, setting forth both Petitioner's view of the facts of the case and various legal contentions regarding the facts alleged. While Respondent deems the factual allegations of paragraph five to be somewhat incomplete, Respondent does not dispute the substantial accuracy of the same except to the extent that in the last sub-paragraph of said statement Petitioner incorrectly implies that the testimony of Petitioner's accomplice and co-conspirator, Wade L. Truett, was uncorroborated. Such testimony was, in fact, corroborated by physical evidence, as well as the evidence of other witnesses. See *Evans v. State,* 222 Ga. 393, 403-407 (1966).

6. Paragraph six of the Application sets forth Petitioner's legal contentions as to why the writ should be granted which requires no answer except that Respondent denies that such contentions are valid or meritorious.

FIFTH DEFENSE

Answering further, Respondent shows the Court that each and every contention of Petitioner respecting the alleged violation of rights secured to him under the United States Constitution has been fully, fairly, properly and correctly disposed of in the state court proceedings and that none of such contentions present a substantial federal question for determination by this Court.

SIXTH DEFENSE

Answering further, Respondent shows the Court that Petitioner is lawfully imprisoned and detained by Respondent pursuant to a valid indictment, plea, verdict and sentence, certified copies of which are attached as Exhibit "A" hereto and incorporated by reference herein.

WHEREFORE, having fully made this Return and Answer, Respondent prays:

(a) That Petitioner's Application be denied;

(b) That the Writ of Habeas Corpus not issue;

(c) That the Petitioner be remanded to the custody of the Respondent; and

(d) That Respondent have such other and further relief as to the Court may seem just and proper.

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Assistant Attorney General

P. O. Address:
132 Judicial Bldg.
40 Capitol Square
Atlanta, Georgia

ALFRED L. EVANS, JR.
Assistant Attorney General
Attorneys for Respondent

(Exhibits, jurats and certificate of service omitted in printing)

5. Order of the United States District Court for the Southern District of Georgia dated May 2, 1967, transferring the case to the Northern District of Georgia.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA, ex rel. ALEX S. EVANS, *Petitioner*	APPLICATION FOR WRIT OF HABEAS CORPUS
vs.	
A. L. DUTTON, Warden, Georgia State Prison, *Defendant*	CIVIL ACTION NO. 2072

ORDER

It appearing that the petition for writ of habeas corpus was filed in the United States District Court for the Southern District of Georgia by the petitioner, Alex S. Evans; It further appearing that there are matters in the case which should be decided by the United States District Court for the Northern District of Georgia; It further appearing that there are common issues in the above styled cause and in the petition for writ of habeas corpus as filed by Venson Eugene Williams against A. L. Dutton, Warden, Georgia State Prison, being Civil Action No. 2057, in the United States District Court for the Southern District of Georgia; It further appearing that counsel for petitioner was engaged in the United States District Court for the Middle District of Georgia

on April 25, 1967, when the above styled case and the case filed by Venson Eugene Williams were sounded for hearing; It further appearing that the two cases should be heard together; It further appearing that this Court has discretion under Title 28 USCA §2241 to transfer the above styled case to the Northern District of Georgia;

IT IS HEREBY ORDERED AND ADJUDGED that the application for writ of habeas corpus as filed in the United States District Court for the Southern District of Georgia be and is hereby transferred for hearing and final determination to the United States District Court for the Northern District of Georgia, Atlanta Division; IT IS FURTHER ORDERED that all of the pleadings and record as heretofore filed in this Court be and are hereby transferred to the United States District Court for the Northern District of Georgia, Atlanta Division; and, IT IS FURTHER ORDERED that the deposition of James H. Stanley as filed in this Court be and is hereby transferred to the United States District Court for the Northern District of Georgia, Atlanta Division; IT IS ALSO ORDERED that the stay of execution as previously granted by this Court is in full force and effect as previously granted and the said transfer does not in any way affect the said order staying the execution.

This 1st day of May, 1967.

/s/ HILL HEWLETT

HILL HEWLETT
Judge, U. S. District Court
Southern District of Georgia

6. Order of the United States District Court for the Northern District of Georgia dated September 6, 1967, denying Appellee Evans' application for a Writ of Habeas Corpus.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION.

UNITED STATES OF AMERICA, ex rel. ALEX S. EVANS vs. A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia	CIVIL ACTION NO. 10923

ORDER OF COURT

The petitioner in the above styled case is under a death sentence. The case was transferred to this district under 28 U.S.C., §2241 (d) (1966) which allows a state prisoner seeking a federal habeas corpus to proceed in the district court for the district in which he was sentenced instead of the district in which he is confined. It was originally brought in the Southern District where the petitioner is confined in Reidsville State Penitentiary.

The petitioner was tried for the murder of the Gwinnett County policemen whose bodies were found handcuffed together on the morning of April 17, 1964. The charges against the petitioner were first made public over a year later, on July 1, 1965.

The petitioner Evans was found guilty on October 21, 1966 and was sentenced to death the same day. The appeal to the Supreme Court of Georgia resulted in affirmance of the trial court, *Evans vs. The State,* 222 Ga. 392, and certiorari to the United States Supreme Court was denied on November 14, 1966, 385 U.S., 953.

The district judge for the Southern district where this case was originally filed entered an order staying the execution of Evans on December 14, 1966. The order of transfer to this district specified this last mentioned order would remain in effect.

The State does not take the position in its reply that all state remedies have not been exhausted. It contends, however, that the state court determination on these questions is correct and that no substantial federal question is presented. It is said that a full and adequate hearing was had on all factual questions in the state court proceedings and that the factual determinations made by the state court are fairly supported by the record as a whole. Respondent expressly admits that petitioner's motions relating to his constitutional contentions were made and disposed of during the state court proceedings (see page 3, paragraph 6 of the response). Thus it appears state remedies have been exhausted so as to entitle this Court to assume jurisdiction. See *Brown v. Allen,* 344 U.S. 343 (1953); *Whippler v. Balcom* (5 Cir. 1965) 342 F.2d 388; *Rogers v. Davis* (5 Cir. 1963) 323 F.2d 653.

The petitioner Evans raises the same contentions as the petitioner Williams in Civil Action No. 10924 with one addition which will be discussed below. The Court adheres to its rulings made in the Williams case in re-

gard to pre-trial discovery, trial discovery, exclusion of jurors opposed to capital punishment, and the use of testimony from an accomplice who was given immunity. A careful review of the Evans record shows no abuse of discretion in denial of the motion for a change of venue. The failure to exclude the juror Higgins caused no injury to the petitioner's rights because this juror was later challenged preemptorily by one of the nineteen strikes exercised out of an available twenty.

In addition to the grounds raised by Williams the petitioner Evans also contends he was denied his constitutional right to confront a witness whose testimony was used against him. At the trial a witness on behalf of the state, Lynwood Shaw, testified that he was a fellow inmate at the Atlanta Penitentiary with Evans' co-indictee Williams when the latter was arraigned under the murder charge. He stated that Williams stated to him after his return from court that

> "If it had not been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."

While it may be slightly confused from the record, it appears that petitioner's real contention is the petitioner's right to confrontation and cross-examination pertains to Williams, the co-conspirator who made the above statement. The same complaint was made to the trial judge and before the Georgia Supreme Court which held the evidence admissible, citing Ga. Code Section 38-306 which provides,

> ". . . after the fact of conspiracy shall be proved, the declarations by one of the conspirators during the pendency of the criminal project shall be admissible against all."

Citing a Georgia case the Supreme Court stated further,

> "The rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other."

The Court stated,

> "The defendant, and his co-conspirator Williams, at the time this statement was made, was still concealing the identity, keeping secret the fact that they killed the deceased, if they had, and denying their guilt." See *Evans vs. The State,* 222 Ga. 392 (6) at page 402.

Among cases cited by petitioner's counsel is the case of *Pointer vs. Texas,* 380 U.S. 400, wherein the Court points out the value of the right of confrontation guaranteed under the Sixth Amendment and covered by the Fourteenth Amendment. However, the Court points out exceptions to the necessity of confrontation stating,

> "This Court has recognized the admissibility against an accused of dying declarations and of testimony of a deceased witness who has testified at a former trial. There are other analogous situations which might not fall within the scope of the Constitutional rule requiring confrontation of witnesses." See 13 Led 2nd at page 928.

Professor Wigmore in discussing the right of confrontation and cross-examination refers to such exceptions to the hearsay rule and in connection therewith he points out, "Others might be expected to be developed in the future." He stated "The Constitution does not prescribe what kinds of testimonial statements shall be given infra-

judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed." See *Wigmore on Evidence,* Vol. V, page 131. It is well established under Federal law that statements by co-conspirators are admissible against other conspirators if made during pendency of the conspiracy or while it was being concealed. There was other evidence that petitioner Evans was a conspirator. The evidence was admissible under Georgia law and did not violate any Constitutional right of petitioner. In a habeas corpus proceeding by a state prisoner if there is error it must amount to a deprivation of a constitutional right. *Commonwealth of Pennsylvania vs. Maroni,* 348 F2nd 22 and cases cited.

After a careful examination of the entire record in the state court this Court can find no denial of a constitutional right which would entitle the petitioner Evans to a writ of habeas corpus from this Court. The relief prayed for is DENIED and the Clerk is directed to enter a Judgment in accordance herewith.

The stay of execution, heretofore entered, is ordered to continue in effect thirty (30) days from the date of this Order so that counsel may move the appellate court for further relief if they deem such action appropriate.

This the 6th day of September, 1967.

/s/ FRANK A. HOOPER

FRANK A. HOOPER
Senior District Judge

7. Judgment entered by the United States District Court for the Northern District of Georgia dated September 6, 1967, in favor of Appellant Dutton, Warden and against Appellee Evans.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, ex rel. ALEX S. EVANS vs. A. L. DUTTON, Warden Georgia State Prison, Reidsville, Georgia	NO. 10923 CIVIL ACTION

JUDGMENT

The Court, Honorable Frank A. Hooper, United States District Judge, by order of this date having denied the petition for writ of habeas corpus,

JUDGMENT is hereby entered in favor of the respondent and against the petitioner.

Dated at Atlanta, Georgia, this 6th day of September, 1967.

CLAUDE L. GOZA, Clerk
By: /s/ ROBERT J. TIDWELL
Deputy Clerk

Filed and entered in
Clerk's Office this
September 6, 1967
CLAUDE L. GOZA, Clerk
By: RJT
Deputy Clerk

8. Order of the United States District Court for the Northern District of Georgia dated September 21, 1967, allowing Appellee Evans' application for an appeal in forma pauperis.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, ex rel. ALEX S. EVANS vs. A. L. DUTTON, Warden Georgia State Prison, Reidsville, Georgia.	CIVIL ACTION NO. 10923

CERTIFICATION ON APPLICATION FOR AN APPEAL IN FORMA PAUPERIS

After careful consideration the Court hereby certifies that the petitioner's application for an appeal in forma pauperis is taken in good faith and the same is hereby ALLOWED.

At Atlanta, Georgia, this the 21st day of September, 1967.

/s/ FRANK A. HOOPER

FRANK A. HOOPER
Senior District Judge

9. Opinion of the United States Court of Appeals for the Fifth Circuit dated September 16, 1968, reversing the decision of the United States District Court for the Northern District of Georgia.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25348

ALEX S. EVANS,

Appellant,

VERSUS

A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(September 16, 1968)

Before GEWIN and THORNBERRY, Circuit Judges, and EDENFIELD, District Judge.

GEWIN, Circuit Judge: A year and a half after three police officers were found shot to death in Gwinnett County, Georgia, appellant Evans was tried before

a jury and convicted of the murder of one of the officers. Since the jury did not recommend mercy, the Gwinnett County Superior Court sentenced him to die in the electric chair. Having exhausted his state remedies,[1] Evans filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, alleging that his conviction had been obtained in violation of his sixth and fourteenth amendment rights. The district court denied the petitioned relief and Evans has appealed to this court. We have determined that Evans was denied his sixth and fourteenth amendment right to be confronted by the witnesses against him. We therefore reverse the judgment of the district court.

This case was argued before this court with *Williams v. Dutton*[2] which was the appeal of an alleged coconspirator of Evans. The relevant background facts are set forth in *Williams* and we will not repeat them here. In addition, most of the issues raised are common to both cases. Since we must reverse on the confrontation question, we do not reach Evans' other contentions.[3] However, we should point out that many of the same issues will arise upon the retrial of this case and, in the interest of sound judicial administration, we commend

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[1]The Georgia Supreme Court affirmed Evans' conviction, Evans v. State, 222 Ga. 392, 150 S.E.2d 240 (1960), and the United States Supreme Court denied his petition for a writ of certiorari. Evans v. Georgia, 385 U.S. 953 (1966).

[2]_____ F.2d _____ (5th Cir. 1968) [No. 25349, August 20, 1968].

[3]The other contentions concern the availability and extent of discovery to a criminal defendant against the state; the qualification of jurors; the admissibility of the testimony of a witness who has been granted immunity from prosecution; and the availability of discovery in a federal habeas corpus proceeding.

a reference to the treatment in *Williams* of those constitutional questions.

The facts upon which Evans' sixth amendment contention rests are not in dispute. During Evans' trial a witness, one Shaw, testified that Williams had stated to him that "if it hadn't been for that dirty-son-of-a-bitch, Alex Evans, we wouldn't be in this now." According to Shaw, Williams made this statement the day after his arraignment in Gwinnett County on the murder charge and in response to Shaw's inquiry as to how Williams had made out in court. At the time of the alleged statement, both Williams and Shaw were serving sentences for unrelated crimes in the federal penitentiary in Atlanta, Georgia.[4]

Evans' counsel made a timely and vigorous objection to the statement attributed to Williams, arguing that it was inadmissible under both state evidentiary law and the sixth amendment. The trial court overruled counsel's objection, holding the statement admissible in evidence under a Georgia statute which provides:

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[4]Shaw's testimony was somewhat incredible. He testified that Williams was talking to him in a normal voice through a ten-by-ten plate-glass window in a prison hospital door, while Williams was lying on a bed in the room and Shaw was standing in the hall. Shaw had stated in the Williams trial that the window was coyered only by wire mesh. The fact that it was covered by a pane of plate glass was brought out in Evans' trial. Moreover, evidence was submitted but rejected by the trial court which tended to show that Shaw's testimony may have been compensation for a respite from the dull routine of prison life.

In spite of its basic incredibility, we are convinced that it cannot be called harmless. *See* Chapman v. California, 386 U.S. 18, 24 (1967): "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." In his dissenting opinion, Justice Quillian of the Georgia Supreme Court stated that Shaw's "testimony . . . obviously was prejudicial to the defendant." Evans v. State, 222 Ga. 392, 400, 150 S.E.2d 240, 251 (1966).

> After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.[5]

The Georgia Supreme Court upheld the ruling of the trial court, stating:

> The defendant [Evans], and his co-conspirator, Williams, at the time this statement was made, were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt. There was evidence sufficient to establish a prima facie case of conspiracy to steal the automobile and the killing of the deceased by the conspirators while carrying out the conspiracy, and the statement by Williams made after the actual commission of the crime, but while the conspiracy continued was admissible.[6]

The confrontation clause of the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In the early case of *Salinger v. United States* the Supreme Court stated:

> The right of confrontation did not originate with the provision in the 6th Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.[7]

Thus the fact that the framers of the Constitution did

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[5]Ga. Code Ann. § 38-306 (1954 rev.).

[6]Evans v. State, 222 Ga. 392, 400, 150 S.E.2d 240, 248 (1966).

[7]272 U.S. 542, 548 (1926). *See* Dowdell v. United States, 221 U.S. 325, 330 (1911); Kirby v. United States, 174 U.S. 47, 61 (1899); Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897); Mattox v. United States, 156 U.S. 237, 243 (1895).

not intend to exclude hearsay evidence appears to have been viewed as having ossified the rule as then developed. This is a regrettably shallow assessment of the wisdom and foresight of those responsible for the destiny of this nation.[8] But this view of the confrontation clause presented no difficulty so long as the clause was applicable only in the federal courts, because the confrontation-hearsay rule was then, for all practical purposes, a single principle in federal criminal cases.[9] History complicated the role of the federal judiciary, however, when the fourteenth amendment was adopted and the federal constitutional standard of due process of law was imposed upon the states. Since many of the rights and privileges embodied in the Bill of Rights had long been regarded as fundamental to any concept of ordered liberty, they were expectably enforced against the states under the due process clause of the fourteenth amendment.[10] The enforcement of the confrontation clause against the states now requires the application of a none-too-concrete standard to state hearsay rules which have experienced a various and even erratic evolution.[11] Thus the duty of this court is not only to interpret the framers' original

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[8]*See* Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 229 (1955): "No doubt, these provisions of the Constitution were not calculated to give permanent legal sanction merely to the social arrangements and beliefs of a particular epoch. Like all legal provisions without a fixed technical meaning, they are ambulant, adaptable to the changes of time. That is their strength. . . ."

[9]See cases cited in note 7 *supra*.

[10]*See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment right against unlawful search and seizure). *See generally* Henkin, *"Selective Incorporation" In the Fourteenth Amendment*, 73 Yale L.J. 74 (1963).

[11]McCormick, Evidence § 230 (1954).

concept in light of historical developments,[12] but also to translate into due-process terms the constitutional boundaries of the hearsay rule.[13]

In applying the confrontation clause to the states, the Court in *Pointer v. Texas* stated:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. . . . The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safe-guards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.[14]

However, neither *Pointer* nor any subsequent decision adequately explains how and when a state hearsay rule exceeds permissible constitutional bounds. In spite of the Court's effusive language, the confrontation clause is certainly not violated merely because the defendant is not permitted to confront and cross-examine a witness against him. The Court has approved the admission, under a recognized exception to the hearsay rule, of a statement by a witness who is unavailable at the time of trial despite the fact that the right of confrontation is

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12*See* Cardozo, The Nature of the Judicial Process 51-97 (1949).

13*But see* Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434 (1966), in which the writer argues against this approach to the confrontation clause.

14380 U.S. 400, 404 (1965).

denied.[15] In explaining a previously recognized exception to the right of confrontation, the Court in *Barber v. Page* stated:

> It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination. . . . This exception has been explained as arising from necessity and justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement.[16]

Generally but not unexceptionally, some evidence is better than none at all. Thus when rational substitutes for the benefits of confrontation actually exist, there is no reason to exclude hearsay evidence. Although we express no view as to the constitutional validity of any exception to the confrontation requirement which has not been ruled upon, it is important to point out that generally recognized exceptions to the hearsay rule have developed from a painful process of rationalizing the denial of confrontation.[17]

The Supreme Court has now made clear that the rationale of hearsay exceptions in criminal cases must be continually scrutinized and reevaluated. In *Barber* the trial court had admitted in evidence the transcript of testimony given at a prior trial upon the prosecutor's showing that the witness was outside the state.

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[15]Pointer v. Texas, 380 U.S. 400, 407 (1965). *See* Bruton v. United States, 36 U.S.L.W. 4447, 4449 n.3 (U.S. May 20, 1968). Also see the pre-*Pointer* cases cited in note 7 *supra*.

[16]36 U.S.L.W. at 4330.

[17]*See* 5 Wigmore, Evidence §§ 1420-27 (3d ed. 1940).

According to the traditional view, the evidence was admissible because a witness outside the jurisdiction is beyond the compulsory process of the court.[18] The Supreme Court rejected this justification, stating:

> Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government have largely deprived it of any continuing validity in the criminal law.[19]

We therefore think it clear that, if an accused is to be deprived of the right to confront and to be confronted by the witnesses against him, there must be salient and cogent reasons for the deprivation. A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact.

Appellee in this case states that Evans "demonstrates a rather basic confusion" in contending that his right to confrontation was infringed because witness Shaw did in fact appear in court and testify. However, we think the confusion is appellee's. The testimony objected to was not Shaw's but that attributed by Shaw to Williams who was not in court and who did not testify. Appellee further argues that the Supreme Court authority cited by Evans involved *written* evidence and that those cases, therefore, do not control the *oral* statement involved here. Since appellee has shown no basis for justifying

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[18] *See* McCormick, Evidence § 234, 1954; 5 Wigmore, Evidence § 1404 (3d ed. 1940).

[19] 36 U.S.L.W. at 4330. The Court held that, unless the prosecutor has made a good-faith effort to secure the witness' presence at the trial and failed, the witness cannot be regarded as unavailable.

a different treatment of written and oral evidence, we reject the distinction as untenable.

We have searched in vain for a reason to justify the abridgment of the right to confrontation which obviously occurred in this case. Appellee merely points to Georgia's coconspirator statute which, rather sphinx-like, answers all but the questions we ask. The admission in evidence of the statement attributed to Williams occurred in circumstances which offered no rational substitute for confrontation.[20] In *Douglas v. Alabama*[21] the state called as a witness against the defendant one Loyd, who had already been convicted on the same charge. When Loyd refused to answer questions, the prosecutor proceeded to read a confession, allegedly made by Loyd, which incriminated the defendant. As he read, the prosecutor would pause occasionally and ask Loyd if he had made the statement read, but Loyd refused to answer any questions. The Supreme Court held that the prosecutor's ventriloquistic performance had violated the defendant's sixth amendment right to confrontation. A substantially similar attempt was made in this case to put words into the mouth of Williams who would doubtless have spit them out if he had testified.[22]

In support of the constitutional validity of the Georgia statute under which Williams' alleged statement was admitted, appellee argues that the statute is identical in

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[20]Appellee has argued in his brief that the trend in the law today is to reject the hearsay rule "as a senseless anachronism." Whatever may be the trend of the law of evidence in civil and administrative proceedings, the trend of the criminal law is subject to a different set of circumstances, not the least of which is the sixth amendment.

[21]380 U.S. 415 (1965).

[22]Since Williams pleaded not guilty and subsequently appealed his conviction, it is almost certain that he would have denied making the statement even if he had agreed to testify.

principle to rules in both federal and state courts. Since the denial of confrontation in the present case is without rational justification, we need not consider the implications of a general judicial acceptance of such a rule. However, we should point out that the statute involved here, as interpreted by the Georgia Supreme Court goes far beyond the traditional coconspirator exception to the hearsay rule.[23] The crime had been committed well over a year before the statement was allegedly made. Moreover, all three of the alleged conspirators were at that time in prison serving sentences for other crimes. With all due respect to Georgia's highest tribunal, it is inconceivable that the statement attributed to Williams was made "during the pendency of the criminal project."[24] The authorities relied upon by appellee[25] make clear that the recognized exception relates only to statements actually made while the criminal conspiracy remained alive.[26]

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[23]*See, e.g.*, Fiswick v. United States, 329 U.S. 211, 216-17 (1946); 4 Wigmore, Evidence § 1079 (3d ed. 1940); Annot., 4 A.L.A.3d 684 (1965); 16 Am.Jur.2d *Conspiracy* § 40 (1964).

[24]The Georgia Supreme Court conceded that Williams' alleged statement was "made after the actual commission of the crime." Evans v. State, 222 Ga. 392, 397, 150 S.E.2d 240, 248 (1966). Additionally, contrary to the state court's finding that the coconspirators were still concealing their identity, the appellee in his brief to this court admits that the statement attributed to Williams was "a statement which implicated Evans." In Fiswick v. United States, 329 U.S. 211, 217 (1946), the Supreme Court stated: "[C]onfession or admission by one co-conspirator after he had been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it."

[25]Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116-17 (1948); United States v. United States Gypsum Co., 333 U.S. 364, 393 (1948); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917); 31A C.J.S. *Evidence* § 362 (1964). Also see authorities cited in note 23 *supra*.

[26]We think it indicative of the evidentiary quality of the statement attributed to Williams that it would not, under generally recognized rules of evidence, have been admissible even if Williams had testified. We know

As construed by the Supreme Court of Georgia, the statutory coconspirator exception to the hearsay rule authorizes practices repugnant to the sixth amendment under the facts and in the circumstances presented in this case. As applied in this case, the statute collides with Evans' sixth amendment right of confrontation. Since appellant Evans' right to confront the witnesses against him was infringed, it is clear that he is entitled to a new trial within a reasonable time. Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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of no rule of evidence which would permit a witness to testify to an incriminating extrajudicial statement made by him sometime in the past.

10. Judgment of the United States Court of Appeals for the Fifth Circuit dated September 16, 1968, reversing the judgment of the United States District Court for the Northern District of Georgia.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 25348

D. C. Docket No. CA 10923

ALEX S. EVANS,

Appellant,

VERSUS

A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before GEWIN and THORNBERRY, Circuit Judges, and EDENFIELD, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, A. L. Dutton, Warden, Georgia State Prison, Reidsville, Georgia, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 16, 1968

Issued as Mandate:

11. Appellant's "Notice of Appeal" to the Supreme Court of the United States filed in the United States Court of Appeals for the Fifth Circuit on September 26, 1968.

(Title omitted in printing)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia, the appellee in the above styled proceeding, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Fifth Circuit reversing the judgment of the United States District Court for the Northern District of Georgia. Said judgment of the United States Court of Appeals for the Fifth Circuit was entered in this action on

September 16, 1968 and this appeal is taken pursuant to 28 U.S.C. § 1254 (2).

ARTHUR K. BOLTON
Attorney General

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MATHEW ROBINS
Assistant Attorney General

Counsel for Appellee

(Certificate of service omitted in printing)

12. Relevant excerpts from the transcript of evidence adduced at Appellee's trial for murder in the State trial court and introduced into evidence and made a part of the record during the hearing on Appellee's application for a Writ of Habeas Corpus before the United States District Court for the Northern District of Georgia.

STATE OF GEORGIA	GWINNETT SUPERIOR COURT
v.	No. 7284
ALEX S. EVANS, Defendant	CHARGE OF MURDER

* * *

Transcript of evidence of the above captioned matter, hearing held in Lawrenceville, Georgia, October 18, 19, 20, 21, 1965, sentence of the Court on October 21, 1965, before HONORABLE CHARLES C. PITTARD, Judge, Gwinnett Judicial Circuit.

* * *

Appearances:

For the *STATE OF GEORGIA* :

Reid Merritt, Esquire
Solicitor-General, Gwinnett Judicial Circuit
and,
Luther Hames, Esquire
Special Ass't. Atty. General

For the *DEFENDANT ALEX S. EVANS* :

MR. ROBERT THOMPSON
and,
MR. E. C. BRANNON

OFFICIAL TRANSCRIPT

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[139] with Alex Evans about an Oldsmobile switch?

A Yes, sir, I did.

MR. MERRITT: You can come down.

MR. THOMPSON: Does Counsel imply by that this is in the record there?

MR. HAMES: We didn't want to wait any longer, we think it is.

THE COURT: Who do you wish next, Mr. Merritt?

MR. MERRITT: Mr. Shaw.

LYNWOOD W. SHAW, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MERRITT:

Q Give the Court and Jury your full name, please, sir?

A Lynwood W. Shaw.

Q Where are you originally from, Mr. Shaw?

A Florida.

Q What part of Florida?

A Tallahassee.

Q Do you know Venson Eugene Williams, Mr. Shaw?

A Yes.

Q Did you have an occasion to have a conversation with him this year?

A Yes, sir.

Q When was that conversation?

A It was in July.

Q July of which year?

A Of this year.

[140]

Q 1965?

A Yes.

Q Can you recall more specifically anything about when it was?

A It was on Saturday.

Q First or latter part or middle part of July?

A It was on or about the 11th, I think, 10th, somewhere it was on the weekend, it was Saturday.

Q Could you speak up a little louder.

A It was on Saturday after he had been to Court, to the hearing.

Q Been to Court?

A Yes.

Q Do you know anything about that appearance?

A Beg your pardon?

Q Do you know anything about that appearance?

A I believe it was for arraignment hearing.

Q That Mr. Williams had?

A Yes, sir.

Q Do you know where it was held?

MR. THOMPSON: If it please the Court, we submit that the witness hasn't been identified but from prior knowledge we know he is in the United States Penitentiary.

THE COURT: Wait just a minute, Mr. Thompson. He has been identified as to name and been sworn and whatever else you wish to bring out you may do so, or the State may do so, but this is no proper way [141] to do it.

BY MR. MERRITT:

Q You say this was on Saturday after he had been to a hearing?

A Yes.

Q Do you know where the hearing was?

A Gwinnett County; I am not sure of the town, but it was at the hearing, I was under the impression.

Q All right, speak up a little louder if you would.

A Yes, sir.

Q Did you discuss this with him –

A With –

Q Did you discuss this with him and if so what did you say and what was his response?

MR. THOMPSON: If it please the Court, we object to any conversation had between this witness and Williams, any other party out of the presence of the defendant as being hearsay.

THE COURT: Objection overruled.

BY MR. MERRITT:

Q Tell us what this conversation consisted of, Mr. Shaw?

MR. THOMPSON: If it please the Court, we have a further objection, we would like to make and feel probably should be made out of the presence of the Jury.

THE COURT: I will ask you to retire to your Jury Room, gentlemen.

(Whereupon the Jury was retired from the Courtroom.)

THE COURT: All right, state your objection.

[142]

MR. THOMPSON: If it please the Court, we object to this witness testifying as to any conversation had with the defendant Williams out of the presence of the defendant on the grounds that such evidence, such testimony would be hearsay, that this defendant is entitled to be confronted with the witnesses who testify against him under the provisions of the United States Constitution and under the Constitution of the State of Georgia, and to permit this witness to testify as to what somebody else told him would be in substance to permit the testimony of another witness or another party to testify through this man's lips and to deny the defendant the right of confrontation guaranteed by Article 1, Paragraph 5 of the Constitution of the State of Georgia of 1945, Georgia Code Section 2-105 and of the Constitution of the United States, Sixth Amendment, Section 1-806 of the Code. We are aware of the fact there is a statute of the State of Georgia which provides, that is Georgia Code Section 38-308 — 306, which provides that after the fact of conspiracy shall be proved the declarations by any one of the conspirators during its pendency of the crime the criminal project shall be admissible against all. We submit that if the Statute is construed by this Court to permit hearsay testimony under the circumstances present here, that it would be a violation of the two [143] sections of the constitution that we have referred to above. Just one moment.

If it please the Court –

THE COURT: Anything further in your motion?

MR. THOMPSON: Yes, sir, further objection, we urge that in order for a – statement ex parte, that is hearsay statement, that is a statement made out of the presence of the defendant to be admissible against the other defendant on trial, the same must be made during its pendency of the conspiracy and in furtherance of the conspiracy. Now, on the three grounds that we have stated, we submit that the testimony that this witness is about to give is not admissible and perhaps in some respect, our objection and motion might be premature, but we submit if the witness is permitted to testify as we anticipate, he will – having heard his testimony on the prior trial, it will be so prejudical – it will so prejudice the minds of the Jury that to make an objection subsequently and to make these objections, I should say subsequently, would be of little avail even though the Court should sustain them and would withdraw the testimony or the evidence from the Jury's consideration. So we are making this motion at this time prior to the introduction of the testimony. Now, we do have the transcript of this witness' testimony at the prior trial, we might state in [144] substance, state in effect what we expect the answer to the question to be, concerning his conversation and that is this, the witness on the prior trial was asked the question and the only thing pertinent to this trial of this case, actually, in what statement did Mr. Williams make to you and in response to your

question, how did you make out and his answer he said, "If that dirty S.O.B. Alex Evans hadn't shot Everett, we wouldn't be in this mess." We submit to permit the witness to testify to that before the Jury could not be corrected by motion or objection made after his testimony, and therefore we make the objection at this time, and move that his testimony in that regard to excluded.

THE COURT: I will hear from you, Mr. Hames.

MR. HAMES: May it please the Court, I'm not sure, but I think the exact question that he raises with reference to the confrontation has already been passed on in the case of Rawlins versus the State, to my recollection, it's in that case, I was looking for it here in making a response to the question, but be that as it may, the Code Section says that once the conspiracy is established, the defendant – that the testimony of the acts and declarations of one conspirator out of the presence of the other is not hearsay and he said if this Court construes that to mean that it would be unconstitutional, the Court of Appeals of Georgia in 90 Georgia Appeals, [145] Page 797, Spradling versus the State, it is already construed the Code Section in holding that it is not hearsay, it says the declarations and conduct of brother defendant immediately before the fatal shooting was properly admitted by the Court to explain conduct and sustain motives, not as hearsay, but as original evidence for the reason set forth in the corresponding division of the opinion. That – in that it says Code Section 138-302 provides when a legal in-

vestigation, information or conversation, and also applies to similar evidence or facts to explain conduct and ascertain motives, they shall be admitted in evidence, not as hearsay but as original evidence. Code Section 38-306 provides that after the fact of a conspiracy shall be proved, that the declarations by any one of the conspirators during its pendency of the criminal project shall be admissible against all. The defendant here and reading from the facts of this opinion, the defendant here on trial for murder, which reason it was proper for the State to introduce evidence tending to show premeditation and malice on his part, since no case will be murder without malice, expressed or implied, the conspiracy existence or agreement between two or more persons to do an unlawful act, and may be shown by acts and conduct as well as by proof or express agreement. Breedlove versus State 84 Georgia Appeals, 370, the fact the party **[146]** is – parties received information on which he acted is admissible, not to establish the truth of the information but to explain the conduct of the party. It says following from above, and this is Judge Townsend, certainly one of the most liberal judges of the Court of Appeals to have – to speak for the Court, follows from above, while the Court should be careful to exclude evidence as to hearsay as to the defendant, such declarations of others not named in his presence, such evidence is sometimes admissible and when as here it is so closely connected with the events leading up to the criminal transaction as to have probative value, bearing upon the motive

and conduct of the defendant, the declarations of another, even when made outside the presence of the defendant, may be relevant if so closely connected with the crime itself as to have probative value by showing motive or opportunity on the part of the defendant. In this connection see Jones versus State 63 Georgia 395, Ledbetter versus the State 51 Georgia Appeals, 560, headnote 2 in the case of Garrett versus the State in 157 Georgia on page 817, reading from headnote 1 of that opinion while hearsay testimony is generally inadmissible, when information, conversation or similar evidence is pertinent to explain conduct or ascertain motive such evidence so far as these purposes are concerned, [147] changes in character from hearsay to original evidence, to throw light on the conduct or motive. Now, with reference to the conspiracy remaining open, I had the Rawlins case, Your Honor, 124 Georgia on Page 31, reading from the body – headnote 12 on Page 32 when in the trial of a murder case there is evidence tending to show the accused on trial entered into a conspiracy to slay the deceased, and others, the acts and conduct and sayings of any of the conspirators while the conspiracy was in progress and before the crime was committed, are admissible as evidence as well as acts of conspirators, other than the accused, after the commission of the crime, when the act sought to be proved was contemplated by the terms of the conspiracy to be performed after the perpetration of the crime was completed, and this case was Appealed to the United States Supreme Court and it was affirmed in 201 Georgia –

201 U. S., 638, and reported in 26 Supreme Court, 560, and also cited in 50 law edition 899.

THE COURT: Gentlemen, the Court is ready to rule on the thing. I don't want to cut off further argument, the motion is in the record. It is the opinion of the Court that the conspiracy prima facie has been established by the testimony in this case and it now becomes a question of the Jury and the Court must submit it to the Jury the question whether or not the conspiracy has or has not been [148] established, and if the Jury should find a conspiracy has been established, then the testimony or statements or acts of anyone connected with the conspiracy during its continuance, before or concealment after the crime, I think would be admissible against all who participated therein. The Court therefore overrules your objection, Mr. Thompson, and will allow the answer.

Call the Jury back.

(Whereupon the Jury was returned to the Courtroom.)

THE COURT: You may proceed.

BY MR. MERRITT:

Q Mr. Shaw, at the time you mentioned earlier in your testimony that you had a conversation with Venson Eugene Williams, tell us what that conversation was?

A This conversation took place, as I stated, on Saturday, on or about the 11th of July. This was the day after Venson Williams had been to Court in Gwinnett County. I went to his room, asked him how did he make out.

Q Asked him —speak a little louder.

A I went to his room in the hospital and asked him how did he make out in Court.

Q Asked him how did he make out in Court?

A How did he make out in Court.

Q What was his response?

A He said, if it hadn't been for that dirty-son-of-a-bitch, Alex Evans, we wouldn't be in this now.

[149]

MR. MERRITT: He is with you.

MR. THOMPSON: If it please the Court, we object on the grounds previously stated, we move the Court to exclude the testimony just given.

THE COURT: Mr. Thompson, the Court has already ruled, overruled that.

MR. THOMPSON: I know the Court ruled. We wanted to perfect the record in case, the witness has now testified, if the previous motion is held premature, we wanted to make sure —

THE COURT: State your motion.

CROSS EXAMINATION

BY MR. THOMPSON:

Q Mr. Shaw, this conversation you are relating now, took place where?

A Beg your pardon?

Q Where did this conversation you just related take place?

A In the hospital.

Q In the hospital at the United States Penitentiary at Atlanta?

A Yes.

Q You were in custody of the United States Attorney General at that place, is that correct?

A That's right.

Q What were you doing in the hospital?

A I worked there.

Q What are your duties?

A Doctor's clerk.

Q Doctor's clerk?

[150]

A Yes, sir.

Q Exactly what does that require you to do?

A It requires maintaining records, just most anything that practically — anything that a female secretary would ordinarily do in performing her duties for the doctor on the outside.

Q Now, the doctor's office in which you work is on the first floor of that hospital building is it not?

A That's correct.

Q And the second floor is where some of the patients are located?

A Yes, sir.

Q At the time of the conversation you just referred to, where was Venson Williams?

A Where was he at the time this conversation took place?

Q Yes, sir.

A It took place in Room 4 or 5 on C Ward; I am inclined to believe it was 4, C Ward is the only ward we have a B, C, and D, and E, and the ward – and T Ward. C Ward is a long ward which has private rooms. D Ward has some private rooms.

Q Yes, sir. Where did this conversation take place?

A On C Ward.

Q C Ward?

A Yes.

Q And you think this was Room 4 of C Ward?

A Room 4 or 5, as I said, I am inclined to think it was 4.

Q Could you locate the room by referring to something else there in the building?

A Yes, I can. It is nearly directly off to the right, approximately, maybe four or five feet across the hall from the [151] technicians' office.

Q That is the MTA office?

A Yes, sir, the office would be here and the room is about like that.

Q Yes, sir, then, if it is Room 4 across from that office it would be Room 4 you are talking about, in Ward C?

A Yes, sir.

Q And that is the second floor of the building you work in?

A Yes, sir.

Q Do you remember, – do your duties take you up to that floor, Mr. Shaw?

A Yes, sir.

Q Are you frequently up there?

A Any time that I wanted to go.

Q What functions do you perform on the second floor?

A Well, I make the rounds with the doctor, if I want to find out anything from a patient, if the doctor wants to know anything from the patient he will send me up to find it out or if he wants a chart and no one available to bring it down, I will go up and get it.

Q Then you are permitted freely to go up on the second floor any time you want to?

A Yes.

Q How long had you known Venson Williams at that time, Mr. Shaw?

A How long had I known him?

Q Yes.

A I had only known Venson from the time he entered the hospital, **[152]** Venson was brought in the hospital from an accident, I presume, the records would show that.

Q How long would this be, Mr. Shaw, that you have known him?

A Oh, well – I couldn't give you the exact time, but it was – I was one of the first to talk to Venson when he entered the hospital. By that I mean, they brought him in on the ambulance and carried him to the emergency room.

Q Was this a week, two weeks, month or how long?

A No, sir, it was longer than – you mean that I had known him?

Q Yes, sir.

A It was longer than a month.

Q Longer than a month?

A Yes.

Q Was it two months?

A It could have been, yeah.

Q In the area then of two months that you had known him?

A Yeah.

Q Had you been real close to him, Mr. Shaw?

A Well, no, I wouldn't exactly say close, I would say we had talked on several occasions.

Q Did he discuss his private affairs with you on these occasions?

A Not then.

Q Now – what are you presently serving time in the penitentiary for

A I am presently serving time in the penitentiary for

possession of counterfeit money and possession of U-Drive-It automobile.

Q Is that interstate transportation of stolen motor vehicle?

[153]

A Yes, sir, that's right.

Q Those the only two offenses you are presently serving time for?

A Presently serving, yes – two charges of counterfeit.

Q Yes, sir.

A But it is – counterfeit.

Q Did you go on trial on those two cases or did you plead guilty?

A I went on trial on one in Alabama and plead guilty of the other.

Q That the counterfeiting case in Alabama?

A Yes, sir.

Q Did you testify in that case?

A Did I testify?

Q Yes, sir.

A I did, sir.

Q You were placed under oath, were you not?

A Yes, sir.

Q And you testified under oath?

A Yes, sir.

Q Did you testify in that case that you were guilty of the offense for which you were convicted?

A Certainly did.

Q You testified you were guilty?

A Yes, sir.

Q But you plead not guilty and went on trial?

A Yes, sir. Would you like to know –

Q No, sir.

[154]

MR. HAMES: Your Honor, I think he has a right –

THE COURT: He has a right.

THE WITNESS: Gentlemen, the reason I plead not guilty to the charge, there were two co-defendants in this counterfeit conspiracy, one plead guilty, Mr. Fox, plead guilty. The girl I was with plead not guilty and I plead not guilty to try to get – which the girl was not guilty and I plead not guilty and I got on the stand and told the Jury that I wasn't up there trying to plead not guilty, I had offered to plead guilty, but they wouldn't drop the charges against her and I would plead not guilty and –

BY MR. THOMPSON:

Q The Jury found you guilty and you were sentenced on that?

A Yes, sir.

Q You ever been convicted of any other felony?

A Yes, sir.

Q What was that for?

A Moonshine whiskey.

Q When was that, Mr. Shaw?

A I don't – couldn't give you the dates, I will say this though, I have a record – I can't give you dates, but I have a record of worthless checks, moonshine whiskey, counterfeiting and automobile.

Q And what is your age, Mr. Shaw?

A Beg your pardon?

Q What is your age?

A Thirty-eight.

[155]

Q How much of that time have you spent in jail?

A How much of that time?

Q Yes, sir.

A Well, I would say, I would say approximately, now this is approximately, I would say approximately six years. Did I understand you correct, in jail.

Q Yes, sir. Where are you from, Mr. Shaw?

A I am from Florida.

Q What part of Florida?

A Tallahassee.

Q That Leon County?

A Yes, sir.

Q How long have you lived in Leon County?

A How long?

Q Yes, sir.

A Off and on all my life, I lived up –

Q What kind of work do you follow at home?

A Well, I was assistant manager of finance company and as I said, I bootlegged a little, and I worked as a cook, drove a taxi.

Q Mr. Shaw, on the date that you had the counversation with Mr. Williams, did you have any particular purpose for being up on the second floor in Ward C?

A No, no more than I would have any other time, I was just there. This was on Saturday morning and as a rule on the weekend, I would go over to the office and catch up on my work that may be backlogged from the week. There was nothing pressing, I didn't have to go but I believe the **[156]** record will show that I spent most of my weekends at the office, more or less to break the monotony of the time.

Q What time of day was it you talked with him?

A It was the morning part of the day.

Q Now, when you had this conversation with Mr. Williams, where was he inside of Room 4?

A Yes.

Q What size room is that?

A I don't exactly know, I don't have it – never measured the room, it is – maybe I would say the room

is approximately, maybe twice as long as that table and approximately twice as wide.

Q Well, you have never had any occasion to measure it, would you say it is in the neighborhood of 12 feet deep and 8 or 9 feet wide?

A I would say it's approximately that.

Q It has a full size hospital bed in it at that time did it not?

A It has a regular hospital bed which is –

Q Well, regular size hospital bed?

A Yes, uh'huh.

Q Mr. Williams on the bed or sitting up there?

A He was on the bed.

Q Is the head of the bed toward the wall or toward the door?

A Is the head – now, I don't know which you would call the head, if you are familiar with the hospital beds, either end could be used as the head, which they are, and the particular instance you are asking about, you are wanting **[157]** to know which end his head was at, it was at the end facing the door – not facing the door, and toward the door, he was facing the wall.

Q He was facing the wall?

A His head, if he was looking out the window, he would be looking this way and his head was at this end of the bed.

Q Was he looking toward – what window, the outside window?

A Window here at the time the door – the door is here which is a wooden door, the door is here and he was–

Q Just a moment please. Let me ask you – would you draw a diagram of that door for us, please. The door you are speaking of opens into a hall, is that correct?

A Opens into a hall.

Q Yes.

A The door opens into the room.

Q Well, it opens off of the hall then?

A Yes, sir.

Q And opens into the room then?

A Yes, sir, it's a long corridor.

Q And if you had walked into that room, Room 4, Ward C, the bed at that time would have been on the right hand side of the room as you face toward the outside window, is that correct?

A Yes, sir.

Q And it would have been up in that right hand corner of the room?

A Yes, sir.

Q And ran lengthwise along the right hand wall?

[158]

A Yes, sir.

Q Now, you state, Mr. Williams' head was toward the door at the time?

A Yes.

Q Was he in position where he was looking at you, where you were talking at him?

A Yes, sir, he was looking back – you have to look back, Mr. Williams had only been out of the cast a short time.

Q Was the door opened or closed when you were talking to him, Mr. Shaw?

A The door was closed.

Q You talked to him through the door?

A No, sir, I talked to him through an opening which is approximately, well, I would say maybe ten by ten, something, which is an opening in the door about like this.

Q Yes, sir, is that opening just a wide opening or does it have glass or a grill or anything in it?

A No, sir, that opening has a piece of plate glass, window glass, just ordinary window glass, and a piece of steel mesh. It is no regular screen wire, it is something a little heavier than screen wire, and which has holes in it.

Q Yes, sir. Does this impede talking through the door at all?

A Beg your pardon?

Q Does this impede or interfere with your talking through the door?

A No, sir.

Q You just talk in a normal voice when you talk through that [159] door?

A Yes.

Q One would not have to raise his voice to hear through that?

A No.

Q You state it has a piece of plate glass in the window – in the opening, is that correct?

A Yes.

Q When you testified before, it did not have such a glass in it?

A No, sir, It didn't.

MR. THOMPSON: Mark these please.

(Whereupon Defendant's exhibits 1, 2, and 3 were marked for purposes of identification by the Court Reporter.)

BY MR. THOMPSON:

Q I hand you what the Clerk has identified – the Reporter identified as D-1 and ask you if that is a picture of that door, Room 4?

A I would say it looks like the door of Room 4.

Q That picture does have No. 4 to the left of the door does it not?

A Very faint.

Q Does that picture fairly disclose or represent the door as it existed at the time you are talking about?

A Yes, sir, it looks similar to it.

Q That picture taken from the outside or inside of the room, can you tell?

A I would presume from looking at the picture it was taken from the outside.

[160]

Q Would you say that fairly portrays and depicts the scene of Room 4 of Ward C, showing the opening in the door?

A If this is not it, it is a good imitation.

Q Very much like it, anyway?

A Yes, sir.

Q I hand you what has been identified as Defendant's Exhibit No. 3, and ask you if – that might be the inside of the door or does that fairly portray the inside of the door?

A Well, those rooms is more – I couldn't say that this was Room 4, I can say this, it could be Room 4.

Q That does – it does portray the type door we are talking about does it not?

A Well, –

Q It shows the grill work that you mentioned?

A Uh'huh.

Q Now, your conversation that you have testified to was carried on through that closed door?

A That's right.

Q Are you talking now at the voice you normally talk to – when you are talking through the door?

A Yes.

Q You talk about the tone and velocity you are speaking now?

A Well, I might vary a little, I wouldn't say this is the exact tone, I will say it is near the tone I would talk in.

Q How far would you say Mr. Williams' head was from where you were when you were talking to him?

A I would say his head was no more — pardon me, no more than the distance of this — this piece here.

[161]

Q What distance would you say that is, about five feet, four feet?

A Three or four feet, yes, sir.

MR. THOMPSON: You want to see that?

MR. HAMES: No.

MR. THOMPSON: You can come down.

MR. MERRITT: One further question.

REDIRECT EXAMINATION

BY MR. MERRITT:

Q You mentioned glass being in that opening, could you describe that glass a little better?

A Yes, sir, it is glass — it is glass, it is a protective —

Q I don't mean the purpose, nature of the glass.

A It is a piece, I would say it is no more than a piece of window pane, it's in this mesh I was telling you about.

Q Yes. How would you compare it to a normal window pane?

A I never measured but I say certainly no bigger than the normal window pane.

Q Bigger?

A It wouldn't be any smaller or bigger, I would say it's about those window panes there, look to be approximately the size of it.

Q How else could you describe it and compare it with the window pane?

A Well, if I may – what are you referring to?

Q Would it be thicker or thinner?

A I would say it wouldn't be any thicker, no, sir, it's just **[162]** regular piece of –.just a regular piece of glass, it is not a glass that you could break – you could break it if you hit it very easily, they have been broken by – maybe people wanted to push something in one of those rooms, they had isolated.

MR. MERRITT: All right, sir, come down.

MR. THOMPSON: I have a few more questions.

RECROSS EXAMINATION

BY MR. THOMPSON:

Q Mr. Shaw, when did you first officially call this information to anybody's attention?

A When did I recall it to anybody's attention?

Q Yes, sir, this conversation you had, when did you first call it to somebody's attention?

A Oh, let's see, I don't know the exact date that I called it to anyone's attention, I didn't agree – I didn't agree to testify until Thursday before the case started on a Monday.

Q Who did you tell about this conversation?

A Who did I tell about it?

Q Yes, sir, who did you first tell about it?

A The Deputy Marshall.

Q Deputy Marshall?

A Yes.

Q Didn't call it to the attention of any of the officials at the United States Penitentiary?

A That I did not.

Q What Deputy Marshall was this?

[163]

A Mr. Herndon.

Q Do you have any detainers against you?

A That I do.

Q Just what is a detainer?

A It is a detainer for a worthless check.

Q What is the detainer?

A It is another charge.

Q Charge pending against you, and you can't get out of jail on parole unless it's disposed of?

A No, sir, that is wrong.

Q What —

A You can — the Attorney General has at his discretion, he can turn you over to a State that has a detainer, if he so desires. The State can request you or the parole board can parole you at any time. As a matter of

fact, they are paroled a lot to the States now, people that have detainers.

Q Then, if you had some high spot in your prison life you might even get paroled with a detainer?

A As far as parole is concerned, if you will check the record, I have waived parole the first time, not the fact I didn't want parole, but I waived parole the first time and I went back up and the parole was denied. I don't know what reason — as far as parole is concerned, I am not even interested in parole.

Q You are not interested in parole?

A No.

MR. THOMPSON: You can come down.

* * *

[422]

(Whereupon the Jury was retired from the Courtroom.)

(Whereupon, the Jury was returned to the Courtroom.)

THE COURT: Gentlemen of the Jury, have you arrived at a verdict in this case?

JURY FOREMAN O. T. KITCHENS, JR., We have, Your Honor.

THE COURT: Before this verdict is received, let the Court caution the audience that there shall be no show of emotion and no outbursts of any kind.

Mr. Solicitor, you may receive the verdict.

MR. MERRITT: "We, the Jury find the defen-

dant guilty. O. T. Kitchens, Jr., Jury Foreman, October 21, 1965."

THE COURT: Let that verdict be received.

Court will remain in session.

I will be out for about 15 or 20 minutes.

Mr. Thompson, is there any reason why sentence should not be imposed in this case?

MR. THOMPSON: No, sir.

THE COURT: Let the Defendant stand.

Mr. Evans, the Jury has found you guilty in this case without a recommendation, it therefore becomes mandatory upon this Court as a matter of law to impose the following sentence.

The State of Georgia versus Alex S. Evans, No. 7284, Gwinnett Superior Court, September Term, 1965, charge of murder.

Whereupon, the Jury in the above stated case having returned the following verdict, "We, the Jury find [423] the defendant guilty. O. T. Kitchens, Jr., Foreman, October 21, 1965".

It is considered, ordered and adjudged by the Court that the defendant, Alex S. Evans, be taken from the bar of this Court to the common jail of Gwinnett County or to some other safe and secure place under such guard and protection as may be deemed necessary where he shall be safely and securely kept until his removal therefrom to the custody of the Director of the State Department of Corrections, for the purpose of the execution of this sentence in the manner prescribed by law.

It is further ordered and adjudged by the Court that on the 30th day of November, 1965, that the defendant, Alex S. Evans, shall be executed by the Director of the State Department of Corrections at such penal institution as may be designated by said Director, and witnessed only by the executing officer, defendant's relatives, counsel and such clergymen and friends as he may desire.

It is further ordered that the Sheriff of Gwinnett County together with such Deputies as he may deem necessary, the number of guards to be approved by the presiding Judge or Ordinary of said County, shall convey and deliver the said Alex S. Evans to the said Director of State Department of Corrections at such penal institution as may be designated by [424] said Director not more than 20 days and not less than 2 days prior to the time fixed herein for the execution of said condemned person.

And there delivered into the custody of the said Director.

And it is further ordered that the said defendant, Alex S. Evans, on the day fixed herein between the hours of 10:00 o'clock a. m., and 2:00 o'clock p. m., be by the Director of the State Department of Corrections electrocuted at the time and place and in the manner herein provided by law.

And may God have mercy on your soul.

Signed this 21st day of October, 1965.

Supreme Court of the United States

No. 829 --- *, October Term, 19* 68

A. L. Dutton, Warden,

Appellant,

v.

Alex S. Evans

APPEAL from the United States Court of Appeals for the Fifth Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

February 24, 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No._____

A. L. DUTTON, Warden,
Georgia State Prison, Reidsville, Georgia,

Appellant,

v.

ALEX S. EVANS,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

Opinions Below

The opinions of the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Fifth Circuit are at this time unreported. Both are set forth in the Appendix, pp. 1a-16a.

Jurisdiction

This action stems from a petition for a writ of habeas corpus filed by Appellee in the United States District

Court for the Northern District of Georgia under 28 U.S.C. § 2241, alleging *inter alia* that Appellee's State court conviction for murder had been obtained in violation of his "confrontation" rights under the Sixth and Fourteenth Amendments.[1] The crux of Appellee's contention involved the admission of testimony of a co-conspirator's declaration into evidence as a statutory exception to the hearsay rule. The United States District Court held that application of the statute (i.e. Ga. Code Ann. § 38-306) did not violate any of Appellee's constitutional rights and denied his petition. On appeal the United States Court of Appeals for the Fifth Circuit reversed, holding that said statute, as construed and applied by the Supreme Court of Georgia, did conflict with the "confrontation clause" of the Sixth Amendment. It is from this judgment, rendered on September 16, 1968, that Appellant on September 26, 1968 filed his Notice of Appeal in the Court of Appeals for the Fifth Circuit.

The jurisdiction of the Supreme Court to review the decision of the Court of Appeals on appeal is conferred by 28 U.S.C. § 1254(2). Cases believed by Appellant to sustain this Court's jurisdiction to review the decision on appeal include *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135 (1962); *City of Detroit v. Murray Corporation of America*, 355 U.S.

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[1]The same assertion, along with various others, was rejected by the Supreme Court of Georgia in its affirmance of Appellee's conviction, see *Evans v. State*, 222 Ga. 392, 150 S.E.2d 240 (1966), and Appellee's petition for a writ of certiorari, again urging the point, was denied by this Court. *Evans v. Georgia*, 385 U.S. 953 (1966).

489, 492-93 (1958); and *Watson v. Employees Liability Assurance Corp.*, 348 U.S. 66, 69-70 (1954).

Questions Presented

1. Whether the hearsay rule, with all of its subtleties, anomalies and ramifications, is to be read into and equated with the "confrontation clause" of the Sixth Amendment?

2. In the event the hearsay rule is to be construed as a constitutional mandate under the Sixth Amendment, does its application to the States under the Fourteenth Amendment require that the nature and scope of long standing State law exceptions to this heretofore evidentiary rule now be restricted to such exceptions as may be thought by the reviewing Federal court to be desirable under the particular circumstances of the case presented?

3. Did the Court of Appeals err in holding that the State statute providing for a co-conspirator exception to the hearsay rule (i.e. Ga. Code Ann. § 38-306), as construed by the Supreme Court of Georgia to cover the period during which a conspiracy continues for the purpose of concealing a crime, is repugnant to the "confrontation clause" of the Sixth Amendment?

4. Did the Court of Appeals err in reversing the United States District Court in that the testimony in question, in light of the totality of the evidence presented, was so minuscule as to render its admission "harmless error" even if it were to be held to have been improperly admitted under the hearsay rule and "confrontation clause" of the Sixth Amendment?

Statement of the Case

At approximately 1:30 A.M. on April 17, 1964 three police officers of Gwinnett County, Georgia were dispatched to investigate a report of unusual vehicular activity in a rural area of that county. The three officers did not return and around 9:30 A.M. their bodies were found, handcuffed together, in a pine thicket. The bodies bore multiple gunshot wounds, primarily in the back of the head [T. 11-24].[2] Officer Jerry Everett, for whose murder Appellee Evans was subsequently tried and convicted, had received five wounds, with powder burns around those in his head indicating that the fatal shots had been inflicted from a range of only two feet [T. 45-47]. The empty police car in which the three officers had been riding was located in the vicinity as was a burning 1963 maroon or red hardtop Oldsmobile which had been stolen in Atlanta the previous evening [T. 16-26].

After more than a year of intensive investigation Appellee Evans, along with Venson Eugene Williams, was, on August 23, 1965, indicted for the murder of Officer Jerry R. Everett. To the indictment Evans entered a plea of not guilty, elected to be tried separately, and was so tried on October 18-21, 1965.

Evidence adduced during the trial, largely through the testimony of Wade L. Truett (an accomplice),

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[2] "T." references are to page numbers as they appear in the trial transcript which has been certified by the Clerk of the United States Court of Appeals for the Fifth Circuit as an Exhibit to the record in the instant habeas corpus proceeding. References to pages of the record proper, as prepared for transmittal to the Supreme Court of the United States are indicated with the customary "R."

showed the following: Venson Eugene Williams and Truett operated a garage in Hartsville, South Carolina, their business consisting largely of the purchase, repair and sale of wrecked cars. At the time they purchased a badly damaged 1963 model maroon hardtop Oldsmobile in Atlanta, they agreed that the only way in which they could make a profit on the wrecked vehicle would be to steal an identical model and repair the purchased car with parts from the stolen automobile. To assist them in their plan they telephoned Appellee Alex S. Evans, who lived in Gwinnett County, Georgia, relating their need for a 1963 maroon hardtop Oldsmobile [T. 188-193]. Several days later Evans informed Williams and Truett that he had located the required vehicle and they drove to Atlanta, picking Evans up en route. The Oldsmobile was successfully stolen in Atlanta and the three then drove both Williams' car and the stolen car to a rural location of nearby Gwinnett County in order to change license plates and replace the ignition switch on the dash board of the stolen auto [T. 207-209].

While Truett was changing the license plates on the Oldsmobile the police car and three officers dispatched to investigate the report of unusual vehicular activity arrived on the scene. Shortly thereafter Evans managed to remove a gun from the holster of the youngest police officer who had been bending over in the front seat of the stolen car examining the ignition switch. With this pistol in one hand and his own in the other Appellee Evans ordered all three officers to put up their hands. Williams disarmed the officers and Truett manacled them with their own handcuffs. Truett testified that he then drove the police car back off the road and into some woods, and when returning toward the spot

where Evans and Williams had taken the three officers heard what sounded like a "nickel pack of firecrackers" going off. Arriving at the scene he saw the three officers, still handcuffed together, lying on the ground. One officer was making a peculiar sound and Truett testified that he saw Williams bend over and shoot the officer two or three times more while Alex Evans held a flashlight for him. Williams and Evans set fire to the stolen Oldsmobile and with Truett departed in haste [T. 208-222]. Truett's testimony as to the triple murder was corroborated by physical evidence as well as the testimony of various other witnesses, and the jury found Appellee Evans guilty of murder without recommendation of mercy [T. 422-423].

One of the relatively minor bits of evidence introduced by the State during the trial was the testimony of one Lynwood W. Shaw that on the day following Williams' arraignment, in response to Shaw's question as to how he made out, Williams exclaimed:

> "If it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." [T. 148.]

This testimony was admitted over counsel for Evans' objection that it was hearsay and a denial of his confrontation rights under both the Constitution of the State of Georgia and the Sixth Amendment to the United States Constitution. The trial court held that a *prima facie* showing of a conspiracy had been made and admitted the testimony as the declaration of a co-conspirator, an exception to the hearsay rule under Ga. Code Ann. § 38-306 [T. 141-148]. The witness Shaw was cross-examined thoroughly by counsel for Evans [T. 149-163].

Subsequent to his conviction Evans appealed to the Supreme Court of Georgia, again urging that the testimony complained of was improperly admitted. In affirming, the Georgia Supreme Court, as the trial court, considered the evidence sufficient to establish a *prima facie* case of a car theft conspiracy, with the killing of the police officers having taken place while the conspiracy was being carried out. The court observed that at the time the statement was made Evans and his co-conspirator Williams were still concealing their identity, keeping secret the fact that they had killed the officers and denying their guilt, with the declaration therefore admissible as a statutory exception to the hearsay rule (i.e. under Ga. Code Ann. § 38-306). See *Evans v. State*, 222 Ga. 392, 402, 150 S.E.2d 240, 248, *cert. denied*, 385 U.S. 953 (1966).

Evans then filed his petition for a writ of habeas corpus with the United States District Court, where once again his contention was rejected. See Appendix, pp. 1a-5a. The District Court concluded that the Constitution did not prescribe what kinds of testimonial statements should be given within the courts, this being merely a matter of the law of evidence for the time being, and held that the declaration, admissible under Georgia law, did not violate any constitutional right of Evans.

On appeal, however, the United States Court of Appeals for the Fifth Circuit reversed, holding that Georgia's statutory co-conspirator exception to the hearsay rule, as construed by the Supreme Court of Georgia, was repugnant to the Sixth Amendment [R. 133]. Noting that the Supreme Court of the United States had not yet adequately explained "how and when a state

hearsay rule exceeds permissible constitutional grounds" [R. 128], the Court of Appeals proceeded to fashion a test of its own. Apparently adopting as its starting point the view that all hearsay evidence is *per se* a denial of the right of confrontation, the Court of Appeals declared that existing *State* exceptions to the hearsay rule could henceforth be permitted only where under the circumstances of the particular case involved, there are "salient and cogent reasons" to justify the consequential denial of the defendant's right to be confronted by the witnesses against him [R. 130]. While left unsaid the decision of the Court of Appeals makes it quite clear that the power to make the binding determination as to whether sufficiently "salient and cogent reasons" exist for application of a *State* evidentiary rule in a *State* criminal proceeding, is now to be the *Federal* judiciary, in what must necessarily become routine appellate review and supervision via *habeas corpus* proceedings. The "confrontation clause" of the Sixth Amendment, in other words, has not only been expanded in merely so sweeping a manner as to completely envelop and ossify the hearsay rule into a constitutional mandate, but has indeed been expanded beyond the traditional hearsay rule *coupled with its traditional exceptions,* to the point where even the most widely accepted and settled State law exceptions are to be nullified unless in the eyes of the particular Federal judge or judges reviewing a State conviction, admission of the evidence in question, under the particular circumstances presented, was justified by some "salient and cogent reason."

It goes without saying that the case is one of first impression before the United States Supreme Court.

The Questions Are Substantial

1. Whether the hearsay rule, with all of its subtleties, anomalies and ramifications is to be read into and equated with the "confrontation clause" of the Sixth Amendment?

Until now it has never been supposed that the hearsay rule, along with all of its twists and turns, is a constitutional mandate. The traditional view of the "confrontation clause" of the Sixth Amendment has been that it was designed to prevent an accused from being tried upon *ex parte* affidavits or depositions, and require instead that the witnesses who testify against him do so face to face at the trial where they are subject to cross examination. See e.g., *Dowdell v. United States,* 221 U.S. 325, 330 (1911). Until now it was not thought that this constitutional requirement went so far as to control the nature or scope of oral testimony permitted to be given by a witness who is in court and subject to cross examination.[3] This latter aspect of the introduction of evidence in a criminal proceeding has heretofore been left to that far broader evidentiary rule generically described as the hearsay rule. Thus *Wigmore* states:

> "The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially, – this depends on the law of Evidence for the time being, – but

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[3]As already pointed out, the witness Lynwood W. Shaw, to whose testimony Appellee Evans objected, testified in open court in the presence of the accused and not only was available for but was indeed subjected to a thorough cross-examination. Evans' objection related solely to the scope of Shaw's testimony (i.e. Shaw's being allowed to testify as to his audio as well as visual perceptions).

> only what mode of procedure shall be followed – i.e. a cross-examining procedure – in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially." 5 *Wigmore,* Evidence, § 1397 p. 131 (3d ed. 1940).

In *Mattox v. United States,* 156 U.S. 237, 241-42 (1895) this Court similarly indicated that the narrower constitutional standard was not to be equated or confused with the broader evidentiary rule. It was said there of the "confrontation clause" of the Sixth Amendment:

> ". . . that provision was made to exclude any evidence by deposition, which could be given orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of common law."[4]

And more recently, in *Stein v. New York,* 346 U.S. 156, 196 (1953), this Court, in reviewing a State murder conviction, flatly rejected a similar attempt to elevate the hearsay rule to a constitutional requirement, saying:

> "The hearsay-evidence rule, with all of its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment."

This is not to stay, of course, that the constitutional standard and broader evidentiary rule may not in some instances overlap, with certain types of hearsay evidence being of such nature as to fall within the more restricted penumbra of the "confrontation clause." In light of the primary purpose of the constitutional standard being one of preventing trial in criminal cases by *ex parte* affidavits or depositions, it is, for example, hardly sur-

[4]See also *Douglas v. Alabama,* 380 U.S. 415, 418-19 (1965).

prising to find that the admission of documentary hearsay may in some situations be violative of the constitutional right of an accused to confront the witnesses against him. See e.g., *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965). Unlike a live witness a piece of paper cannot be cross-examined.

It must be noted, of course, that in the Federal Judiciary it matters little to a criminal defendant whether he obtains a reversal by virtue of a court's exercise of its supervisory power respecting an evidentiary rule (i.e. "hearsay") or through the application of a constitutional mandate (i.e. "confrontation"). Moreover, it is probably accurate to say that the fact that the distinction was academic in the Federal courts prior to 1965 (when *Pointer* first held the "confrontation clause" to be applicable to the States under the Fourteenth Amendment) has caused various Federal decisions to be less precise on the point than they might otherwise have been.

But whatever the lack of clarity may be, Appellant is unaware of any authority supporting the position adopted by the Court of Appeals. In one fell swoop that court has not only radically expanded the penumbra of the "confrontation clause" to cover all forms and types of hearsay, but has indeed decided that the constitutional requirement goes even further, raising serious questions as to the continuing validity of even the most settled State exceptions to the heretofore evidentiary rule. According to the Court of Appeals for the Fifth Circuit all such generally accepted exceptions must now be "continually scrutinized and reevaluated" by the *Federal courts* to see if "salient and cogent reasons" exist in

each given case to justify their application and the consequential deprivation (according to the Court of Appeals) of an accused's right to confront the witnesses against him. It is assumed, of course, that the Court of Appeals did not intend to disturb those hearsay exceptions recognized by the Federal courts respecting Federal criminal proceedings and that these would continue as automatic exceptions to the "confrontation clause." But no such charity is to apply to State criminal proceedings!

Apparently the only point of hesitation by the Court of Appeals in its sweeping revision of the law of evidence of the various States is the fact that this Court, when applying the "confrontation clause" to the States in *Pointer v. Texas,*[5] failed to go so far. Thus the opinion of the Court of Appeals laments the fact that:

> ". . . neither *Pointer* nor any subsequent decision adequately explains how and when a state hearsay rule exceeds permissible constitutional bounds." [R. 128.]

It might humbly be suggested that perhaps this omission on the part of this Court is due to the fact that it never imagined that *Pointer* and/or subsequent decisions would be construed as having *wholly* overruled *Stein v. New York,* 346 U.S. 156, 196 (1953), causing the hearsay rule, either with or without its traditional exceptions, to be read into and equated with the "confrontation clause" of the Sixth Amendment. Certainly it is safe to say that of all of the rules of evidence which could have been selected for elevation to the dignity of a constitutional mandate it would be exceptionally dif-

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[5]380 U.S. 400 (1965).

ficult to find one less suitable and less deserving than the hearsay rule. This so-called rule, which has so many exceptions as to render its applicability at least as exceptional as the exceptions, has probably been subjected to more criticism than any other evidentiary rule in existence. Many writers have argued for its outright abolition as a senseless anachronism which more frequently impedes than furthers justice. See, e.g., *Hearsay in Administrative Hearings*, 32 Geo. Wash. L. Rev. 689 (April 1964). Obviously this is the trend in civil proceedings. It is now the general rule in administrative hearings, for example, that hearsay *is* admissible. As stated in *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 690 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949), where hearsay evidence not within any of the recognized exceptions was nonetheless admitted over objection:

> "*The common law exclusionary rules of evidence are not based in constitutional interdictions* and are not applicable to administrative proceedings, even of judicial character, in the absence of statutory requirement." (Italics added.)

Inasmuch as the Sixth Amendment is applicable to the States solely through the fundamental fairness notions of the "due process" clause of the Fourteenth Amendment (with the requirement of "due process" applicable to both criminal and civil proceedings) it may appropriately be asked how and why the admission of oral hearsay evidence manages to "shock the conscience" or violate "the very essence of a scheme of ordered liberty"[6] in a criminal proceeding while at the same time

[6]See, e.g., *Rochin v. California*, 342 U.S. 165, 169, 172 (1952); *Bute v. Illinois*, 333 U.S. 640, 659 (1948).

being perfectly proper in a civil action? Is not the function of the rules of evidence in both civil and criminal proceedings to ascertain the truth?

In noting that confusion does exist concerning the extent to which the hearsay rule and right of confrontation overlap, most of the writers seem to agree that the two ought not to be equated. The Constitution is too blunt an instrument to regulate the procedural and evidentiary details of criminal prosecutions. See *Friendly, The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 953-54 (1965). And in expressing reservations concerning certain language of *Pointer v. Texas* it was said in *Confrontation and the Hearsay Rule*, 75 Yale L. J. 1434, 1436 (1966):

> "Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rule of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well."

In concluding discussion of this initial error of the Court of Appeals of expanding the "confrontation clause" so as to cover the hearsay rule in its entirety, it must again be stressed that the present case does not involve hearsay consisting of written testimony taken outside the courtroom. Nor does it involve hearsay respecting any sort of extended opinion evidence. The

witness Shaw, in court and confronting the accused, testified that in response to his question to Williams he received a particular utterance or exclamation. Constitutionally speaking, Appellant finds it difficult to understand why such testimony as to *what he heard* should be any less favorably received than testimony as to *what he saw*. Both are perceptions through sensory organs. We doubt that the courts would be impressed by argument that the "confrontation clause" prohibits a witness from testifying as to the observed physical reaction of an individual to a particular question, e.g., flushed face, scowl, or state of rage. Why should testimony as to observed verbal reaction, particularly where as here it is much in the nature of a spontaneous "ouch," be any less constitutional? We think the "confrontation clause" was never intended to overlap with the hearsay rule respecting testimony of this sort whether or not it was properly admitted under a recognized exception to the rule.

2. **In the event that the hearsay rule is to be construed as a constitutional mandate under the Sixth Amendment, does its application to the States under the Fourteenth Amendment require that the nature and scope of long standing State law exceptions to this heretofore evidentiary rule now be restricted to such exceptions as may be thought by the reviewing Federal court to be desirable under the particular circumstances of the case presented?**

However unfortunate the reading of the hearsay rule into the "confrontation clause" may be in and of itself, the far greater blow to any orderly disposition of criminal cases in State courts lies in the cavalier approach

of the Court of Appeals toward long standing rules of evidence of the various States respecting exceptions to the hearsay rule. Taking a rather expansive view of *Barber v. Page*, 390 U.S. 719 (1968), the Court of Appeals construed that decision as requiring:

> ". . . that the rationale of hearsay exceptions in criminal cases must be continually scrutinized and reevaluated" [R. 129],

and then proceeded to fashion as its test for the constitutionality of State hearsay exceptions, the yardstick of whether or not any exception, under the particular circumstances of the case presented, is to the reviewing Federal court's way of thinking justified by "salient and cogent reasons" [R. 130]. While left unsaid, it must be obvious that this shockingly nebulous standard is in reality nothing less than a transfer from the legislatures and courts of the States to the *Federal* judiciary of the power to make policy judgments as to whether a hearsay exception recognized by *State* law should be allowed in any given *State* criminal proceeding.

The disruptive effect of this sort of Federal "I am King" test upon the trial of criminal cases in State courts is not difficult to foresee. No matter how settled a State's rules of evidence may be regarding the hearsay rule, a State trial judge will rarely if ever be able to know in advance whether or not a United States District Court Judge will conclude during a subsequent habeas corpus review, perhaps some years later, that under the particular circumstances of the case the reasons for admitting the evidence were not sufficiently "salient and cogent." In view of the difficulty, if not impossibility, of recognizing and excluding all hearsay evidence during the heat of trial, it would be difficult to see how any

conviction could ever stand without multiple State court trials and multiple Federal reviews upon habeas corpus "appeals." This Court has already indicated that only a knowing waiver of confrontation rights by an accused will suffice, see *Barber v. Page*, 390 U.S. 719, 725 (1968); *Brookhart v. Janis*, 384 U.S. 1, 4-8 (1966), and if hearsay evidence is a denial of the right to confrontation *per se* as the Court of Appeals concludes, it must be assumed that such hearsay as counsel inadvertently or deliberately fails to object to will (unless such unconstitutionally admitted evidence can be construed to be "harmless error") pollute the entire trial. If it has really come to this, Appellant respectfully submits that in order to save time and money for the Federal and State courts, for counsel, the accused and the taxpaying public, it would be far better to simply have all State criminal violations tried in the Federal courts in the first instance.

If the Court of Appeals is correct in its major premise that "hearsay" and "confrontation" are the same (we still insist they are separate and distinct), it is obvious that some intelligible *objective* standards are desperately needed by State trial courts so as to remove the matter from the quagmire into which it has been dropped and in which it now rests. The Federal "I am King" test, adopted by the Court of Appeals for application to State courts only, clearly fails to furnish such standards.

3. Did the Court of Appeals err in holding that the State statute providing for the co-conspirator exception to the hearsay rule (i.e. Ga. Code Ann. § 38-306), as construed by the Supreme Court of Georgia to cover the period during which a conspiracy continues for the purpose of conceal-

ing a crime, is repugnant to the "confrontation clause" of the Sixth Amendment?

The unwisdom of attempting to read the hearsay rule into the "confrontation clause" of the Sixth Amendment and even greater unwisdom of attempting to subject well settled State exceptions thereto to the completely amorphous test recommended by the Court of Appeals is well illustrated by the facts and applicable evidentiary law respecting the instant case.

As already pointed out the factual situation is one of a witness testifying in court that when he asked a co-conspirator a particular question he received in reply an exclamation in the nature of an "ouch," which to some slight degree also implicated the accused. In showing that under the generally applicable rules of evidence it was entirely proper to admit such testimony, it may first be noted that it is the rule everywhere that out-of-court declarations of a co-conspirator are ordinarily admissible in the trial of another conspirator. E.g., 22A C.J.S. *Criminal Law* § 754; 31A C.J.S. *Evidence* § 362 (both citations noting that the extent to which the declarations are admissible is to a great extent within the discretion of the trial court). This exception to the hearsay rule has repeatedly been recognized by this Court. E.g., *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 116-117 (1948); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 249 (1917). In Georgia it is provided for by statute. Ga. Code Ann. § 38-306 declares:

> "After the fact of conspiracy shall be proved the declarations of any one of the conspirators during the pendency of the criminal project shall be admissible against all."

Concerning the nature of the declaration, the only requirement is one in the nature of relevancy. It must relate to the conspiracy or acts done in furtherance of the conspiracy. As stated in *United States v. E. I. Du Pont de Nemours & Co.*, 107 F.Supp. 324, 325 (D. Del. 1952):

> "A declaration of a co-conspirator is admissible even though made only to other members of the co-conspirator's organization or to other third parties. Du Pont contends, however, the criterion of admissibility of the declaration is 'the making' and the statement can only come in if 'the making' is itself in furtherance of the conspiracy. I think it sufficient for purposes of admissibility if the subject matter of the co-conspirator's admission relates to the purpose of the conspiracy *or is explanatory of acts done in furtherance of the conspiracy. Thus, a statement by a co-conspirator to a third party concerning some act done in furtherance of the conspiracy is admissible although the actual making of the statement in no way furthered the conspiracy.*" (Italics added.)[7]

A second generally recognized limitation, and one which is expressly included in the Georgia statute, is that the declaration must be made during the pendency of the conspiracy. Here, however, a divergence of opinion appears. The general rule appears to be that pendency includes both the period of planning prior to the time of the overt act or acts *and the subsequent period where the thrust of the criminal project is to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense.* E.g., *Reed v. People*, 156 Col. 450, 402 P.2d 68, 71 (1965); *Smaldone v. People*, 103

[7] See also *Wiborg v. United States*, 163 U.S. 632, 658 (1896) (noting that the admissibility of such evidence is largely within the discretion of the trial court).

Col. 498, 88 P.2d 103 (23) (1939); *Dailey v. State*, 233 Ala. 384, 171 So. 729, 731 (1937); *State v. Roberts*, 95 Kan. 280, 147 P. 828 (8) (1915); 16 C.J. *Criminal Law* § 1318, pp. 661-62; 22A C.J.S. *Criminal Law* § 770, pp. 1165, 1167. As stated in 2 Wharton, *Criminal Evidence* § 430 (12th ed. 1955):

> "The acts and declarations of a conspirator are admissible against a co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense, but also its subsequent concealment.
>
> . . . .
>
> "The theory for the admission of such evidence is that persons who conspire to commit a crime, and who do commit a crime, are as much concerned, after the crime, with their freedom from apprehension, as they were concerned, before the crime, with its commission: the conspiracy to commit a crime devolves after the commission thereof into a conspiracy to avoid arrest and implication."

Georgia has long followed the general rule, e.g., *Chatterton v. State*, 221 Ga. 424 (5), 144 S.E.2d 726 (8) (1965), *cert. denied*, 384 U.S. 1015 (1966); *Carter v. State*, 106 Ga. 372, 376-77, 32 S.E. 345, 347 (1899); *Byrd v. State*, 68 Ga. 661, 662 (1881), and when Appellee in the instant case urged his objection to the Supreme Court of Georgia, that Court, after first quoting the pertinent statute (i.e. Ga. Code Ann. § 38-306), rejected his assertion, saying:

> "The rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered

so much a unit that the declarations of either are admissible against the other."[8]

It is recognized, of course, that the co-conspirator exception has been restricted to a narrower scope in the Federal courts. There the conspiracy is viewed as terminating with the completion of the last overt act in furtherance thereof. E.g., *Grunewald v. United States*, 353 U.S. 391, 399-402 (1957); *Krulewitch v. United States*, 336 U.S. 440, 443-444 (1949); *Fiswick v. United States*, 329 U.S. 211, 217 (1946). But the rule has not heretofore been interpreted as a rule of constitutional dimension. Quite to the contrary, this Court expressly noted in *Krulewitch* that it was dealing simply with an *evidentiary rule* to be applied in the Federal courts and took cognizance of the fact that many States, including Georgia, did adhere to the view that "pending" included the period during which the conspirators sought to conceal the crime. See *Krulewitch v. United States, supra* at 443-44.

Moreover, assuming that the Court of Appeals is not attempting to reverse the previously cited decisions of this Court which do allow the admission into evidence of at least those co-conspirator declarations which clearly are made prior to the time of the last overt act of the conspiracy, it would seem to Appellant to be a strange constitutional doctrine which would cause the admissibility of such out-of-court declarations into evidence to turn on the "time of utterance." Surely this has little if anything to do with the usual "trustworthiness" justification for admitting hearsay evidence as an exception to the rule. When looked at from a view of "trustworthi-

[8] *Evans v. State*, 222 Ga. 392, 402, 150 S.E.2d 240, 248; *cert. denied*, 385 U.S. 953 (1966).

ness," the instant declaration seems to Appellant to stand in a far stronger position than the "dying declaration" exception which this Court recognized in *Mattox v. United States,* 146 U.S. 140, 151 (1892) and *Pointer v. Texas,* 380 U.S. 400, 407 (1965). The present declaration was in the nature of a spontaneous exclamation and a declaration against penal interest. A statement against penal interest is ordinarily not apt to be uttered unless true. See *Newberry v. Commonwealth,* 191 Va. 445, 61 S.E.2d 318, 326 (1950); 31A C.J.S. *Evidence* § 217; *Accord, Opper v. United States,* 348 U.S. 84 (1954).

Finally, it is respectfully submitted that it is of no small importance, particularly in times of mass disorder and group lawlessness, that the States be permitted to retain the broader concept of the co-conspirator exception. One illustration of the salubrious nature of construing the term "pendency" so as to include the period of concealment of the crime is *Bryant v. State,* 65 Ga. App. 523, 16 S.E.2d 241 (1941). There it was shown that members of the Ku Klux Klan, including the defendant on trial, had conspired to flog certain individuals. The Court of Appeals held that one of the victims, appearing as a witness, could properly testify that on the morning after he was flogged (i.e. after the primary object or final overt act of the conspiracy took place) he had been warned by one of defendant's co-conspirators not to say anything about the flogging or he might receive an even worse beating. Such testimony relating to the post overt-act period where there exists agreement or concert of action to conceal the crime can in many cases be of considerable assistance in shedding light on the matter. Since this is the purpose of all evidence Appellant submits there is no valid policy reason

to eliminate this long standing exception to the hearsay rule and that the Court of Appeals erred in holding Georgia's statute, as construed by its Supreme Court, to be unconstitutional.

4. **Did the Court of Appeals err in reversing the United States District Court in that the testimony in question, in light of the totality of the evidence presented, was so minuscule as to render its admission "harmless error" even if it were to be held to have been improperly admitted under the hearsay rule and/or "confrontation clause" of the Sixth Amendment?**

It has frequently been held that where the guilt of an accused is established beyond a reasonable doubt by competent evidence, the admission of other evidence which is for some reason incompetent is not prejudicial to an accused and does not constitute ground for reversal, particularly where the improperly admitted evidence is merely corroborative. See *Segurola v. United States*, 275 U.S. 106 (3) (1927); 24B C.J.S. *Criminal Law* § 1915 (5). It is Appellant's contention that even if the Court of Appeals was correct in its view that the Sixth Amendment's "confrontation clause" must now be expanded to cover all hearsay evidence, the testimony here in question was such a minuscule part of the overwhelming mass of evidence of Appellee's guilt as to preclude any possibility that it could even remotely have affected the jury's verdict. A study of the record makes it clear beyond all doubt that Appellee was convicted by the testimony of an accomplice who was an eye witness to the murders, with such testimony being corroborated by an abundance of physical evidence plus the testimony of numerous other witnesses. The somewhat

cryptic but possibly mildly implicating testimony of the witness Shaw to which Appellee objected was entirely corroborative in nature and far less than the proverbial drop in the bucket of the State's evidence.

It is respectfully submitted that under all of the facts and circumstances of this case, reversal on the ground that constitutional error, if any, was "harmless error," would be consistent even under the restrictive view of the doctrine which this Court enunciated in *Chapman v. California,* 386 U.S. 18, 23-24 (1967) and *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963).

CONCLUSION

This case presents substantial questions as to the meaning of the Sixth Amendment's "confrontation clause" and the extent to which the heretofore evidentiary rules of the States respecting hearsay may continue to be utilized in State criminal proceedings. In the absence of reversal or considerable clarification of the nebulous standards which have been adopted by the Court of Appeals for the Fifth Circuit, that Court's decision will at the very least prove to be extraordinarily disruptive to the orderly disposition of criminal proceedings in the State courts for all of the reasons stated. Con-

sideration and resolution of these questions merit plenary briefing and argument before this Court.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, ex rel ALEX S. EVANS vs. A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia	CIVIL ACTION NO. 10923

ORDER OF COURT

The petitioner in the above styled case is under a death sentence. The case was transferred to this district under 28 U.S.C., §2241 (d) (1966) which allows a state prisoner seeking a federal habeas corpus to proceed in the district court for the district in which he was sentenced instead of the district in which he is confined. It was originally brought in the Southern District where the petitioner is confined in Reidsville State Penitentiary.

The petitioner was tried for the murder of the Gwinnett County policemen whose bodies were found handcuffed together on the morning of April 17, 1964. The charges against the petitioner were first made public over a year later, on July 1, 1965.

The petitioner Evans was found guilty on October 21, 1966 and was sentenced to death the same day. The appeal to the Supreme Court of Georgia resulted in

affirmance of the trial court, *Evans v. The State*, 222 Ga. 392, and certiorari to the United States Supreme Court was denied on November 14, 1966, 385 U.S., 953.

The district judge for the Southern district where this case was originally filed entered an order staying the execution of Evans on December 14, 1966. The order of transfer to this district specified this last mentioned order would remain in effect.

The State does not take the position in its reply that all state remedies have not been exhausted. It contends, however, that the state court determination on these questions is correct and that no substantial federal question is presented. It is said that a full and adequate hearing was had on all factual questions in the state court proceedings and that the factual determinations made by the state court are fairly supported by the record as a whole. Respondent expressly admits that petitioner's motions relating to his constitutional contentions were made and disposed of during the state court proceedings (see page 3, paragraph 6 of the response). Thus it appears state remedies have been exhausted so as to entitle this Court to assume jurisdiction. See *Brown v. Allen*, 344 U.S. 343 (1953); *Whippler v. Balcom* (5 Cir. 1965) 342 F.2d 388; *Rogers v. Davis* (5 Cir. 1963) 323 F.2d 653.

The petitioner Evans raises the same contentions as the petitioner Williams in Civil Action No. 10924 with one addition which will be discussed below. The Court adheres to its rulings made in the Williams case in regard to pretrial discovery, trial discovery, exclusion of jurors opposed to capital punishment, and the use of testimony from an accomplice who was given immunity.

A careful review of the Evans record shows no abuse of discretion in denial of the motion for a change of venue. The failure to exclude the juror Higgins caused no injury to the petitioner's rights because this juror was later challenged preemptorily by one of the nineteen strikes exercised out of an available twenty.

In addition to the grounds raised by Williams the petitioner Evans also contends he was denied his constitutional right to confront a witness whose testimony was used again him. At the trial a witness on behalf of the state, Lynwood Shaw, testified that he was a fellow inmate at the Atlanta Penitentiary with Evans' co-indictee Williams when the latter was arraigned under the murder charge. He stated that Williams stated to him after his return from court that

> "If it had not been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."

While it may be slightly confused from the record, it appears that petitioner's real contention is the petitioner's right to confrontation and cross-examination pertains to Williams, the co-conspirator who made the above statement. The same complaint was made to the trial judge and before the Georgia Supreme Court which held the evidence admissible, citing Ga. Code Section 38-306 which provides,

> "... after the fact of conspiracy shall be proved, the declarations by one of the conspirators during the pendency of the criminal project shall be admissible against all."

Citing a Georgia case the Supreme Court stated further,

> "The rule is that so long as the conspiracy to con-

> ceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other."

The Court stated,

> "The defendant, and his co-conspirator Williams, at the time this statement was made, was still concealing the identity, keeping secret the fact that they killed the deceased, if they had, and denying their guilt." See *Evans v. The State,* 222 Ga. 392 (6) at page 402.

Among cases cited by petitioner's counsel is the case of *Pointer v. Texas,* 380 U.S. 400, wherein the Court points out the value of the right of confrontation guaranteed under the Sixth Amendment and covered by the Fourteenth Amendment. However, the Court points out exceptions to the necessity of confrontation stating,

> "This Court has recognized the admissibility against an accused of dying declarations and of testimony of a deceased witness who has testified at a former trial. There are other analogous situations which might not fall within the scope of the Constitutional rule requiring confrontation of witnesses." See 13 L.ed. 2nd at page 928.

Professor Wigmore in discussing the right of confrontation and cross-examination refers to such exceptions to the hearsay rule and in connection therewith he points out, "Others might be expected to be developed in the future." He stated "The Constitution does not prescribe what kinds of testimonial statements shall be given infra-judicially, — this depends on the law of Evidence for the time being, — but only what mode of procedure shall be followed." See *Wigmore on Evidence,* Vol. V, page

131. It is well established under Federal law that statements by co-conspirators are admissible against other conspirators if made during pendency of the conspiracy or while it was being concealed. There was other evidence that petitioner Evans was a conspirator. The evidence was admissible under Georgia law and did not violate any Constitutional right of petitioner. In a habeas corpus proceeding by a state prisoner if there is error it must amount to a deprivation of a constitutional right. *Commonwealth of Pennsylvania v. Maroni,* 348 F.2nd 22 and cases cited.

After a careful examination of the entire record in the state court this Court can find no denial of a constitutional right which would entitle the petitioner Evans to a writ of habeas corpus from this Court. The relief prayed for is DENIED and the Clerk is directed to enter a Judgment in accordance herewith.

The stay of execution, heretofore entered, is ordered to continue in effect thirty (30) days from the date of this Order so that counsel may move the appellate court for further relief if they deem such action appropriate.

This the 6th day of September, 1967.

/s/ FRANK A. HOOPER

FRANK A. HOOPER
Senior District Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25348

ALEX S. EVANS,

Appellant,

VERSUS

A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(September 16, 1968)

Before GEWIN and THORNBERRY, Circuit Judges, and EDENFIELD, District Judge.

GEWIN, Circuit Judge: A year and a half after three police officers were found shot to death in Gwinnett County, Georgia, appellant Evans was tried before a jury and convicted of the murder of one of the officers. Since the jury did not recommend mercy, the Gwinnett County Superior Court sentenced him to die in the

electric chair. Having exhausted his state remedies,[1] Evans filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, alleging that his conviction had been obtained in violation of his sixth and fourteenth amendment rights. The district court denied the petitioned relief and Evans has appealed to this court. We have determined that Evans was denied his sixth and fourteenth amendment right to be confronted by the witnesses against him. We therefore reverse the judgment of the district court.

This case was argued before this court with *Williams v. Dutton*[2] which was the appeal of an alleged coconspirator of Evans. The relevant background facts are set forth in *Williams* and we will not repeat them here. In addition, most of the issues raised are common to both cases. Since we must reverse on the confrontation question, we do not reach Evans' other contentions.[3] However, we should point out that many of the same issues will arise upon the retrial of this case and, in the interest of sound judicial administration, we commend a reference to the treatment in *Williams* of those constitutional questions.

The facts upon which Evans' sixth amendment con-

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[1]The Georgia Supreme Court affirmed Evans' conviction, Evans v. State, 222 Ga. 392, 150 S.E.2d 240 (1960), and the United States Supreme Court denied his petition for a writ of certiorari. Evans v. Georgia, 385 U.S. 953 (1966).

[2]___ F.2d ___ (5th Cir. 1968) [No. 25349, August 20, 1968].

[3]The other contentions concern the availability and extent of discovery to a criminal defendant against the state; the qualification of jurors; the admissibility of the testimony of a witness who has been granted immunity from prosecution; and the availability of discovery in a federal habeas corpus proceeding.

tention rests are not in dispute. During Evans' trial a witness, one Shaw, testified that Williams had stated to him that "if it hadn't been for that dirty-son-of-a-bitch, Alex Evans, we wouldn't be in this now." According to Shaw, Williams made this statement the day after his arraignment in Gwinnett County on the murder charge and in response to Shaw's inquiry as to how Williams had made out in court. At the time of the alleged statement, both Williams and Shaw were serving sentences for unrelated crimes in the federal penitentiary in Atlanta, Georgia.[4]

Evans' counsel made a timely and vigorous objection to the statement attributed to Williams, arguing that it was inadmissible under both state evidentiary law and the sixth amendment. The trial court overruled counsel's objection, holding the statement admissible in evidence under a Georgia statute which provides:

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[4]Shaw's testimony was somewhat incredible. He testified that Williams was talking to him in a normal voice through a ten-by-ten plate-glass window in a prison hospital door, while Williams was lying on a bed in the room and Shaw was standing in the hall. Shaw had stated in the Williams trial that the window was covered only by wire mesh. The fact that it was covered by a pane of plate glass was brought out in Evans' trial. Moreover, evidence was submitted but rejected by the trial court which tended to show that Shaw's testimony may have been compensation for a respite from the dull routine of prison life.

In spite of its basic incredibility, we are convinced that it cannot be called harmless. *See* Chapman v. California, 386 U.S. 18, 24 (1967): "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." In his dissenting opinion, Justice Quillian of the Georgia Supreme Court stated that Shaw's "testimony . . . obviously was prejudicial to the defendant." Evans v. State, 222 Ga. 392, 400, 150 S.E.2d 240, 251 (1966).

> After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.[5]

The Georgia Supreme Court upheld the ruling of the trial court, stating:

> The defendant [Evans], and his co-conspirator, Williams, at the time this statement was made, were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt. There was evidence sufficient to establish a prima facie case of conspiracy to steal the automobile and the killing of the deceased by the conspirators while carrying out the conspiracy, and the statement by Williams made after the actual commission of the crime, but while the conspiracy continued was admissible.[6]

The confrontation clause of the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In the early case of *Salinger v. United States* the Supreme Court stated:

> The right of confrontation did not originate with the provision in the 6th Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.[7]

Thus the fact that the framers of the Constitution did

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[5]Ga. Code Ann § 38-306 (1954 rev.).

[6]Evans v. State, 222 Ga. 392, 400, 150 S.E.2d 240, 248 (1966).

[7]272 U.S. 542, 548 (1926). *See* Dowdell v. United States, 221 U.S. 325, 330 (1911); Kirby v. United States, 174 U.S. 47, 61 (1899); Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897); Mattox v. United States, 156 U.S. 237, 243 (1895).

not intend to exclude hearsay evidence appears to have been viewed as having ossified the rule as then developed. This is a regrettably shallow assessment of the wisdom and foresight of those responsible for the destiny of this nation.[8] But this view of the confrontation clause presented no difficulty so long as the clause was applicable only in the federal courts, because the confrontation-hearsay rule was then, for all practical purposes, a single principle in federal criminal cases.[9] History complicated the role of the federal judiciary, however, when the fourteenth amendment was adopted and the federal constitutional standard of due process of law was imposed upon the states. Since many of the rights and privileges embodied in the Bill of Rights had long been regarded as fundamental to any concept of ordered liberty, they were expectably enforced against the states under the due process clause of the fourteenth amendment.[10] The enforcement of the confrontation clause against the states now requires the application of a none-too-concrete

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[8]*See* Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 229 (1955): "No doubt, these provisions of the Constitution were not calculated to give permanent legal sanction merely to the social arrangements and beliefs of a particular epoch. Like all legal provisions without a fixed technical meaning, they are ambulant, adaptable to the changes of time. That is their strength. . . ."

[9]See cases cited in note 7 *supra*.

[10]*See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment right against unlawful search and seizure). *See generally* Henkin, *"Selective Incorporation" In the Fourteenth Amendment*, 73 Yale L.J. 74 (1963).

standard to state hearsay rules which have experienced a various and even erratic evolution.[11] Thus the duty of this court is not only to interpret the framers' original concept in light of historical developments,[12] but also to translate into due-process terms the constitutional boundaries of the hearsay rule.[13]

In applying the confrontation clause to the states, the Court in *Pointer v. Texas* stated:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. . . . The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safe-guards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.[14]

However, neither *Pointer* nor any subsequent decision adequately explains how and when a state hearsay rule exceeds permissible constitutional bounds. In spite of the Court's effusive language, the confrontation clause is certainly not violated merely because the defendant is not permitted to confront and cross-examine a witness against him. The Court has approved the admission,

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[11]McCormick, Evidence § 230 (1954).

[12]*See* Cardozo, The Nature of the Judicial Process 51-97 (1949).

[13]*But see* Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434 (1966), in which the writer argues against this approach to the confrontation clause.

[14]380 U.S. 400, 404 (1965).

under a recognized exception to the hearsay rule, of a statement by a witness who is unavailable at the time of trial despite the fact that the right of confrontation is denied.[15] In explaining a previously recognized exception to the right of confrontation, the Court in *Barber v. Page* stated:

> It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination. . . . This exception has been explained as arising from necessity and justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement.[16]

Generally but not unexceptionally, some evidence is better than none at all. Thus when rational substitutes for the benefits of confrontation actually exist, there is no reason to exclude hearsay evidence. Although we express no view as to the constitutional validity of any exception to the confrontation requirement which has not been ruled upon, it is important to point out that generally recognized exceptions to the hearsay rule have developed from a painful process of rationalizing the denial of confrontation.[17]

The Supreme Court has now made clear that the rationale of hearsay exceptions in criminal cases must be

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[15]Pointer v. Texas, 380 U.S. 400, 407 (1965). *See* Bruton v. United States, 36 U.S.L.W. 4447, 4449 n.3 (U.S. May 20, 1968). Also see the pre-*Pointer* cases cited in note 7 *supra*.

[16]36 U.S.L.W. at 4330.

[17]*See* 5 Wigmore, Evidence §§ 1420-27 (3d ed. 1940).

continually scrutinized and reevaluated. In *Barber* the trial court had admitted in evidence the transcript of testimony given at a prior trial upon the prosecutor's showing that the witness was outside the state. According to the traditional view, the evidence was admissible because a witness outside the jurisdiction is beyond the compulsory process of the court.[18] The Supreme Court rejected this justification, stating:

> Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government have largely deprived it of any continuing validity in the criminal law.[19]

We therefore think it clear that, if an accused is to be deprived of the right to confront and to be confronted by the witnesses against him, there must be salient and cogent reasons for the deprivation. A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact.

Appellee in this case states that Evans "demonstrates a rather basic confusion" in contending that his right to confrontation was infringed because witness Shaw did in fact appear in court and testify. However, we think the confusion is appellee's. The testimony objected to was

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[18]*See* McCormick, Evidence § 234, 1954; 5 Wigmore, Evidence § 1404 (3d ed. 1940).

[19]36 U.S.L.W. at 4330. The Court held that, unless the prosecutor has made a good-faith effort to secure the witness' presence at the trial and failed, the witness cannot be regarded as unavailable.

not Shaw's but that attributed by Shaw to Williams who was not in court and who did not testify. Appellee further argues that the Supreme Court authority cited by Evans involved *written* evidence and that those cases, therefore, do not control the *oral* statement involved here. Since appellee has shown no basis for justifying a different treatment of written and oral evidence, we reject the distinction as untenable.

We have searched in vain for a reason to justify the abridgment of the right to confrontation which obviously occurred in this case. Appellee merely points to Georgia's co-conspirator statute which, rather spinx-like, answers all but the questions we ask. The admission in evidence of the statement attributed to Williams occurred in circumstances which offered no rational substitute for confrontation.[20] In *Douglas v. Alabama*[21] the state called as a witness against the defendant one Loyd, who had already been convicted on the same charge. When Loyd refused to answer questions, the prosecutor proceeded to read a confession, allegedly made by Loyd, which incriminated the defendant. As he read, the prosecutor would pause occasionally and ask Loyd if he had made the statement read, but Loyd refused to answer any questions. The Supreme Court held that the prosecutor's ventriloquistic performance had violated the defendant's sixth amendment right to confrontation. A substantially

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[20]Appellee has argued in his brief that the trend in the law today is to reject the hearsay rule "as a senseless anachronism." Whatever may be the trend of the law of evidence in civil and administrative proceedings, the trend of the criminal law is subject to a different set of circumstances, not the least of which is the sixth amendment.

[21]380 U.S. 415 (1965).

similar attempt was made in this case to put words into the mouth of Williams who would doubtless have spit them out if he had testified.[22]

In support of the constitutional validity of the Georgia statute under which Williams' alleged statement was admitted, appellee argues that the statute is identical in principle to rules in both federal and state courts. Since the denial of confrontation in the present case is without rational justification, we need not consider the implications of a general judicial acceptance of such a rule. However, we should point out that the statute involved here, as interpreted by the Georgia Supreme Court, goes far beyond the traditional coconspirator exception to the hearsay rule.[23] The crime had been committed well over a year before the statement was allegedly made. Moreover, all three of the alleged conspirators were at that time in prison serving sentences for other crimes. With all due respect to Georgia's highest tribunal, it is inconceivable that the statement attributed to Williams was made "during the pendency of the criminal project."[24]

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[22]Since Williams pleaded not guilty and subsequently appealed his conviction, it is almost certain that he would have denied making the statement even if he had agreed to testify.

[23]*See, e.g.*, Fiswick v. United States, 329 U.S. 211, 216-17 (1946); 4 Wigmore, Evidence § 1079 (3d ed. 1940); Annot., 4 A.L.R.3d 684 (1965); 16 Am.Jur.2d *Conspiracy* § 40 (1964).

[24]The Georgia Supreme Court conceded that Williams' alleged statement was "made after the actual commission of the crime." Evans v. State, 222 Ga. 392, 397, 150 S.E.2d 240, 248 (1966). Additionally, contrary to the state court's finding that the coconspirators were still concealing their identity, the appellee in his brief to this court admits that the statement attributed to Williams was "a statement which implicated Evans." In Fiswick v. United States, 329 U.S. 211, 217 (1946), the Supreme Court

The authorities relied upon by appellee[25] make clear that the recognized exception relates only to statements actually made while the criminal conspiracy remained alive.[26]

As construed by the Supreme Court of Georgia, the statutory coconspirator exception to the hearsay rule authorizes practices repugnant to the sixth amendment under the facts and in the circumstances presented in this case. As applied in this case, the statute collides with Evans' sixth amendment right of confrontation. Since appellant Evans' right to confront the witnesses against him was infringed, it is clear that he is entitled to a new trial within a reasonable time. Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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stated: "[C]onfession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it."

[25]Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116-17 (1948); United States v. United States Gypsum Co., 333 U.S. 364, 393 (1948); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917); 31A C.J.S. *Evidence* § 362 (1964). Also see authorities cited in note 23 *supra*.

[26]We think it indicative of the evidentiary quality of the statement attributed to Williams that it would not, under generally recognized rules of evidence, have been admissible even if Williams had testified. We know of no rule of evidence which would permit a witness to testify to an incriminating extrajudicial statement made by him sometime in the past.

FILE COPY

JAN 9

JOHN F. DAVIS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] #10

A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia,

Appellant,

vs.

ALEX S. EVANS,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia,

Appellant,

vs.

ALEX S. EVANS,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

Comes now Alex S. Evans, Appellee, and files this his Motion to Affirm the judgment from which this appeal is prosecuted and as grounds therefor, respectfully shows:

1.

The judgment below, rendered by the United States Court of Appeals, insofar as it relates to the questions presented by this appeal, is correct and it should be affirmed.

2.

In view of prior rulings of this Court, it is manifest that, in view of the settled law, the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

3.

This Court has already decided the issues presented here contrary to the contentions urged by Appellant by its decisions in *Pointer* v. *Texas*, 380 U.S. 400; *Douglas* v. *Alabama*, 380 U.S. 415; *Brookhart* v. *Janis*, 384 U.S. 1; *Bruton* v. *United States*, ... U.S. ....., 20 L. Ed. 2d 476; *Roberts* v. *Russell*, ... U.S. ....., 88 Sp. Ct. 1921; and in subsequent decisions following these authorities. See also, *Flores* v. *United States*, 5 Cir., 379 F. 2d 905.

4.

The decisions of this Court cited above are controlling as to all issues sought to be presented by this appeal. Accordingly, based upon these authorities, the judgment below should be affirmed.

WHEREFORE, Appellee moves the Court, for the reasons stated, to affirm the judgment from which Appellant prosecutes his appeal and, in the alternative, to dismiss the same.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia,

Appellant,

vs.

ALEX S. EVANS,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN SUPPORT OF MOTION TO AFFIRM

To place in context the ruling of which Appellant complains, Appellee was on trial for the offense of murder. He was jointly indicted with Williams, who had already been tried and sentenced to death. The witness Shaw was permitted to testify that a few weeks earlier, Williams, who, like Shaw was at the time a federal prisoner, had been taken to Gwinnett County for arraignment. Shaw inquired of Williams as to how he had made

out at the arraignment. Williams replied, "If it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." Proper and timely objection having been made to such evidence, the Court of Appeals properly held that this particular hearsay evidence denied Appellee his Sixth Amendment right to confrontation.

In making this ruling, the Court of Appeals held that under the facts of this case, as construed by the Supreme Court of Georgia, Georgia Code Section 38-306 is repugnant to the Sixth Amendment. That code section provides:

> "After the fact of conspiracy shall be proved, the declarations of any one of the conspirators during the pendency of the criminal project shall be admissible against all."

While Appellant has presented his argument under the form of four questions presented, in reality only two questions present themselves. The first is whether Appellee was denied constitutional confrontation. The second is whether the denial of such confrontation was harmful to Appellee. We will address ourselves to the latter question first.

HARMLESS ERROR?

There is no need to speculate as to whether the error was harmful. The right granted to an accused by the Sixth Amendment to confront the witnesses against him includes the right of cross-examination and is made obligatory upon the states by the Fourteenth Amendment. *Pointer* v. *Texas,* 380 U.S. 400. *Where there has been a denial of such right, prejudice to the accused is presumed. Brookhart* v. *Janis,* 384 U.S. 1. In view of this recent holding, it would appear to be unnecessary to say more

on the subject; however, it is not amiss to make other supporting observations.

Before a federal constitutional error can be held harmless, "the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18. A review of the record in this case, despite Appellant's assertion to the contrary, will disclose that the conviction is based almost solely upon the uncorroborated testimony of an accomplice who had been granted *total immunity* from prosecution in three capital offenses confessed to by him, plus assistance in securing his parole release from federal authorities on an unrelated charge. Such corroboration as is shown by the evidence relates to time, place and event, not toward connecting Appellee with the offense.

In this situation, over most strenuous objection by Appellee,[1] the State insisted that the testimony of Shaw was admissible. This arose under circumstances where the testimony was anticipated, as Williams had aready been tried. Thus, at the time the constitutional question was raised, Shaw, who had been brought to court for the express purpose of giving this testimony, had not already testified. The constitutional objection having been raised, had the State at that time considered the evidence "far less than the proverbial drop in the bucket," and non-

1. In footnote 3, page 9 of his brief, Appellant states that the objection related only to the scope of Shaw's testimony, that is, "Shaw's being allowed to testify as to his audio as well as his visual perception." We fail to grasp the connotation; however, only the conversation was at issue. Other than to say that he saw and talked to Williams, Shaw offered no testimony as to his visual perception. The objection (T. 142-144), included: ". . . and to permit this witness to testify as to what somebody else told him would be in substance to permit the testimony of another witness . . . to testify through this man's lips and to deny the defendant the right of confrontation guaranteed by . . . the Constitution of the United States, Sixth Amendment . . .".

harmful and nonprejudicial to Appellee, as it now contends, surely it would have withdrawn the witness.

The testimony of Shaw, in effect, constituted an accusation by Williams, who did not confront Appellee, that Appellee was guilty of the murders. It was certainly the intention of the State that it be so construed and understood. From the manner in which it was presented, there can be no other construction. In no event can it be said that the evidence was harmless beyond a reasonable doubt.

CONFRONTATION

There can no longer be any question but that an accused in a criminal case, save in exceptional circumstances, is entitled to be confronted by his accusers and to exercise his right of cross-examination. *Pointer* v. *Texas,* 380 U.S. 400; *Douglas* v. *Alabama,* 380 U.S. 415; *Brookhart* v. *Janis,* 384 U.S. 1; *Bruton* v. *United States,* ..... U.S. ..... (May 1968); *Roberts* v. *Russell,* ..... U.S. ..... (June 1968); and *Flores* v. *United States,* 5 Cir., 379 F.2d 905. The cited authorities and those decided under their teaching advise that these rights are inalienable and that they may be neither eroded nor emasculated by indirection or subtlety.

The Georgia statute in question, Georgia Code Section 38-306, as construed by the Supreme Court of Georgia and applied in this case, has the effect of infringing these rights. It would probably serve no useful purpose here to give a detailed discussion of the history and development of the criminal conspiracy law of Georgia, but perhaps it would be enlightening to aver to some of its characteristics as it existed at the time of the trial. There was no general "conspiracy" statute at that time. A conspiracy could be proved, though not alleged in the in-

dictment. *Dixon* v. *State*, 116 Ga. 186(8), 42 S.E. 357; *Whitaker* v. *State*, 159 Ga. 787(5), 127 S.E. 106. The common-law of conspiracy did not exist in Georgia. In effect proof of a conspiracy was in reality a rule of evidence and a means of proving the accomplishment of the criminal act. *Bishop* v. *State*, 118 Ga. 799(4), 45 S.E. 614; *Nobles* v. *State*, 98 Ga. 73, 26 S.E. 64.

In this situation, the statutory provision in question, developed from decisional law and later codified, appears. As previously stated, it provides that, "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all. "It is to be noted that in context there is no requirement that such declaration be in *furtherance* of the conspiracy. At the same time, by statute, the Georgia Code Section 38-414, provides:

> "The confession of one joint offender or conspirator, made after the enterprise is ended, shall be admissible only against himself."

However, the latter rule is unavailing, as the Supreme Court of Georgia has consistently held, as it did in Appellee's case, *Evans* v. *State*, 222 Ga. 392, 402, 150 S.E. 2d 240, that a conspiracy, by its nature, includes as a part thereof an agreement to conceal the fact that a crime has been committed and the identity of the perpetrators of the offense. *Chatterton* v. *State*, 221 Ga. 424-(5), 144 S.E. 2d 726. Thus, under the statutory law, as applied by the Supreme Court of Georgia, incidentally, contrary to *Grunenwald* v. *United States*, 353 U.S. 391, until the conspirators are tried and convicted, the conspiracy is deemed to continue and any declaration of one conspirator is admissible against the other, regardless of

whether such declaration is in furtherance of the conspiracy or not. *Evans* v. *State*, supra. For example, under the rulings of the Supreme Court of Georgia, which it followed in the present case, in *Darden* v. *State*, 172 Ga. 590, 158 S.E. 414, a confession made by a co-defendant not on trial, implicating the defendant on trial, although not made in his presence, was nevertheless held admissible against him. The court, after quoting the applicable code section, stated:

> "Under the evidence in the case the jury was authorized to find that there was a conspiracy entered into by the three defendants, who were jointly indicted, to kill (the deceased), and the statements admitted into evidence were declarations of one of the conspirators during the pendency of the criminal project."

It is observed that in earlier cases the Supreme Court of Georgia construed the statute differently, in that it held that declarations of a co-conspirator, to be admissible against one on trial, must not only have been made during the pendency of the conspiracy, but also must have been made *in furtherance of its object*. *Wall* v. *State*, 153 Ga. 309, 112 S.E. 142 (1922). This rule has long since been abandoned, although it is consistent with the federal rule followed ever since *Logan* v. *United States*, 144 U.S. 263, 309.[2] There can be no contention and none has been made by Appellant that the statement attributed to Williams, the co-defendant not on trial, was in any remote way in furtherance of the conspiracy contended for by the State. As the Court of Appeals observed in foot-

2. "Doubtless in all cases of conspiracy the act of one conspirator *in the prosecution of the enterprise* is considered the act of all, and is evidence against all. *United States* v. *Gooding*, 25 U.S. 12, 12 Wheat. 400, 409. But only those acts and declarations are admissible under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object. (Emphasis supplied)

note 22 of its opinion, quoting from *Fiswick* v. *United States*, 329 U.S. 211, 217, a "confession or admission of one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it."

In his brief, at page 19, Appellant concedes that in order for a declaration, such as that with which we are concerned, to be constitutionally admissible under the facts of this case, "It must relate to the conspiracy or acts done in furtherance of the conspiracy." This statement is then followed by the citation of and quotation from the opinion of a District Court *civil* case. This isolated lower Court opinion in a civil case could hardly be said to support any logical contention that the Williams' declaration was, or could be held to be, an utterance in furtherance of the conspiracy here involved. This is particularly true in view of *Logan* v. *United States*, supra; *Pinkerton* v. *United States*, 328 U.S. 640, 646; *Fiswick* v. *United States*, supra; *Brown* v. *United States*, 150 U.S. 93. See cases cited and discussion in *Gambino* v. *United States*, 3 Cir., 108 F. 2d 140.

Appellant has devoted a great portion of his argument to the proposition that involved here is nothing more than a deviation or ramification of the "hearsay rule." While the argument and suggestions following so freely therefrom to some extent tend to obfuscate the real and decisive issue, a denial of confrontation is none the less so because it is the result of hearsay evidence. This Court, in the cases cited hereinbefore, i.e., *Pointer*, *Douglas*, *Brookhart*, *Bruton* and *Roberts*, has decided this issue. The present appeal presents nothing novel nor suggestive that those decisions of this Court should be reviewed or overruled. On the basis of them, the judgment of the Court of Appeals should be affirmed.

We could write more at length, but feel that what we have said, together with the astute and well-reasoned opinion of the Court of Appeals, appearing in the record and printed as the appendix to Appellant's brief, to which we refer this Court for further exposition and convincing logic, suffice to obviate further labors.

In responding to Appellant's brief, we have refrained from engaging in kind with the somewhat vitriolic and sarcastic attack upon the opinion of the Court of Appeals, as we feel such attack is without jurisdiction, but merely demonstrates overzealousness on the part of counsel.

CONCLUSION

This Court has "followed the 'undeviating rule' . . . that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Parker* v. *Gladden*, 385 U.S. 363. The judgment below is consistent with, indeed, demanded by, this Court's prior decisions in this regard. It should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, of Counsel for Appellee, does hereby certify that he has this date served upon Counsel for Appellant a copy of the within and foregoing Motions to Affirm and supporting brief by mailing the same, properly stamped, United States mail addressed: Attorney General, State of Georgia, Attention: Alfred L. Evans, Jr., Esquire, 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia 30334.

This 7th day of January, 1969.

.....

ROBERT B. THOMPSON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~339~~ 10

A. L. DUTTON, Warden,
Georgia State Prison, Reidsville, Georgia,
Appellant,

v.

ALEX S. EVANS,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 829

A. L. DUTTON, Warden,
Georgia State Prison, Reidsville, Georgia,
Appellant,

v.

ALEX S. EVANS,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia, as of this time unreported, is set forth at pages 21 to 25 of the Appendix. The opinion of the Court of Appeals for the Fifth Circuit is reported at 400 F.2d 826 (5th Cir. 1968) and is also set forth in the Appendix at pages 28 to 38 thereof.

JURISDICTION

This action stems from a petition for a writ of habeas corpus filed by Appellee in the United States District

Court for the Southern District of Georgia under 28 U.S.C. § 2241, alleging *inter alia* that Appellee's State court conviction for murder had been obtained in violation of his "confrontation" rights under the Sixth and Fourteenth Amendments.[1] The crux of Appellee's contention involved the admission of testimony of a co-conspirator's declaration into evidence as a statutory exception to the hearsay rule. The case was transferred to the United States District Court for the Northern District of Georgia for hearing and that court held that application of the statute (i.e. Ga. Code Ann. § 38-306) did not violate any of Appellee's constitutional rights, and denied his petition. On appeal the United States Court of Appeals for the Fifth Circuit reversed, holding that said statute, as construed and applied by the Supreme Court of Georgia, did conflict with the "confrontation clause" of the Sixth Amendment. See *Evans v. Dutton,* 400 F.2d 826 (5th Cir. 1968). It is from this last mentioned judgment, rendered on September 16, 1968, that Appellant on September 26, 1968 filed his Notice of Appeal in the Court of Appeals for the Fifth Circuit.

The jurisdiction of the Supreme Court to review the decision of the Court of Appeals on appeal is conferred by 28 U.S.C. § 1254(2). Cases believed by Appellant to sustain this Court's jurisdiction to review the decision on appeal include *United Gas Pipe Line Co. v. Ideal Cement Co.,* 369 U.S. 134, 135 (1962); *City of Detroit v. Murray Corporation of America,* 355 U.S.

[1]The same assertion, along with various others, was rejected by the Supreme Court of Georgia in its affirmance of Appellee's conviction, see *Evans v. State,* 222 Ga. 392, 150 S.E.2d 240 (1966), and Appellee's petition for a writ of certiorari, again urging the point, was denied by this Court. *Evans v. Georgia,* 385 U.S. 953 (1966).

489, 492-93 (1958); and *Watson v. Employees Liability Assurance Corp.*, 348 U.S. 66, 69-70 (1954).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

U. S. CONSTITUTION, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U. S. CONSTITUTION, Amendment XIV

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ga. Code Ann. § 38-306

> "After the facts of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all."

QUESTIONS PRESENTED

1. Whether the hearsay rule, with all of its subtleties, anomalies and ramifications, is to be read into and equated with the "confrontation clause" of the Sixth Amendment?

2. In the event the hearsay rule is now to be construed as a constitutional mandate under the Sixth Amendment, should it be applied to the States under the Fourteenth Amendment in such manner as to require that the nature and scope of even the most settled and long standing State law exceptions to this heretofore evidentiary rule henceforth be restricted to such exceptions and applications as may at some *later* date be thought desirable, under the particular circumstances of the case presented, by a reviewing Federal judge?

3. Did the Court of Appeals err in holding that the State statute providing for a co-conspirator exception to the hearsay rule (i.e. Ga. Code Ann. § 38-306), as construed by the Supreme Court of Georgia to cover the period during which a conspiracy continues for the purpose of concealing a crime, is repugnant to the "confrontation clause" of the Sixth Amendment?

4. Did the Court of Appeals err in reversing the United States District Court in that the testimony in question, in light of the totality of the evidence presented, was so minuscule as to render its admission "harmless error" even if it were to be held to have been improperly admitted under the hearsay rule and "confrontation clause" of the Sixth Amendment?

STATEMENT OF THE CASE

At approximately 1:30 A.M. on April 17, 1964 three police officers of Gwinnett County, Georgia were dispatched to investigate a report of unusual vehicular activity in a rural area of that county. The three officers did not return and around 9:30 A.M. their bodies were found, handcuffed together, in a pine thicket. The bodies bore multiple gunshot wounds, primarily in the back of the head [T. 11-24].[2] Officer Jerry Everett, for whose murder Appellee Evans was subsequently tried and convicted, had received five wounds, with powder burns around those in his head indicating that the fatal shots had been inflicted from a range of only two feet [T. 45-47]. The empty police car in which the three officers had been riding was located in the vicinity as was a burning 1963 maroon or red hardtop Oldsmobile which had been stolen in Atlanta the previous evening [T. 16-26].

After more than a year of intensive investigation Appellee Evans, along with Venson Eugene Williams, was, on August 23, 1965, indicted for the murder of Officer Jerry R. Everett. To the indictment Evans entered a plea of not guilty, elected to be tried separately, and was so tried on October 18-21, 1965.

Evidence adduced during the trial, largely through the testimony of Wade L. Truett (an accomplice), showed the following: Venson Eugene Williams and

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[2] "T." references are to page numbers as they appear in the trial transcript which has been certified by the Clerk of the United States Court of Appeals for the Fifth Circuit as an Exhibit to the record in the instant habeas corpus proceeding. References to pages of the record proper, as prepared for transmittal to the Supreme Court of the United States are indicated with the customary "R."

Truett operated a garage in Hartsville, South Carolina, their business consisting largely of the purchase, repair and sale of wrecked cars. At the time they purchased a badly damaged 1963 model maroon hardtop Oldsmobile in Atlanta, they agreed that the only way in which they could make a profit on the wrecked vehicle would be to steal an identical model and repair the purchased car with parts from the stolen automobile. To assist them in their plan they telephoned Appellee Alex S. Evans, who lived in Gwinnett County, Georgia, relating their need for a 1963 maroon hardtop Oldsmobile [T. 188-193]. Several days later Evans informed Williams and Truett that he had located the required vehicle and they drove to Atlanta, picking Evans up en route. The Oldsmobile was successfully stolen in Atlanta and the three then drove both Williams' car and the stolen car to a rural location of nearby Gwinnett County in order to change license plates and replace the ignition switch on the dashboard of the stolen auto [T. 207-209].

While Truett was changing the license plates on the Oldsmobile the police car and three officers dispatched to investigate the report of unusual vehicular activity arrived on the scene. Shortly thereafter Evans managed to remove a gun from the holster of the youngest police officer who had been bending over in the front seat of the stolen car examining the ignition switch. With this pistol in one hand and his own in the other Appellee Evans ordered all three officers to put up their hands. Williams disarmed the officers and Truett manacled them with their own handcuffs. Truett testified that he then drove the police car back off the road and into some woods, and when returning toward the spot where Evans and Williams had taken the three officers

heard what sounded like a "nickel pack of firecrackers" going off. Arriving at the scene he saw the three officers, still handcuffed together, lying on the ground. One officer was making a peculiar sound and Truett testified that he saw Williams bend over and shoot the officer two or three times more while Alex Evans held a flashlight for him. Williams and Evans set fire to the stolen Oldsmobile and with Truett departed in haste [T. 208-222]. Truett's testimony as to the triple murder was corroborated by physical evidence as well as the testimony of various other witnesses, and the jury found Appellee Evans guilty of murder without recommendation of mercy [T. 422-423].

One of the relatively minor bits of evidence introduced by the State during the trial was the testimony of one Lynwood W. Shaw that on the day following Williams' arraignment, in response to Shaw's question as to how he made out, Williams exclaimed:

> "If it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." [T. 148, Appendix, p. 55].

This testimony was admitted over counsel for Evans' objection that it was hearsay and a denial of his confrontation rights under both the Constitution of the State of Georgia and the Sixth Amendment to the United States Constitution. The trial court held that a *prima facie* showing of a conspiracy had been made and admitted the testimony as the declaration of a co-conspirator, an exception to the hearsay rule under Ga. Code Ann. § 38-306 [T. 141-148, Appendix, p. 54]. The witness Shaw was cross-examined thoroughly by counsel for Evans [T. 149-163, Appendix, pp. 55 to 72].

Subsequent to his conviction Evans appealed to the Supreme Court of Georgia, again urging that the testimony complained of was improperly admitted. In affirming, the Georgia Supreme Court, as the trial court, considered the evidence sufficient to establish a *prima facie* case of a car theft conspiracy, with the killing of the police officers having taken place while the conspiracy was being carried out. The court observed that at the time the statement was made Evans and his co-conspirator Williams were still concealing their identity, keeping secret the fact that they had killed the officers and denying their guilt, with the declaration therefore admissible as a statutory exception to the hearsay rule (i.e. under Ga. Code Ann. § 38-306). See *Evans v. State,* 222 Ga. 392, 402, 150 S.E.2d 240, 248, *cert. denied,* 385 U.S. 953 (1966).

Evans then filed his petition for a writ of habeas corpus with the United States District Court, where once again his contention was rejected. See Appendix, pp. 21 to 25. The District Court concluded that the Constitution did not prescribe what kinds of testimonial statements should be given within the courts, this being merely a matter of the law of evidence for the time being, and held that the declaration, admissible under Georgia law, did not violate any constitutional right of Evans [Appendix, pp. 24-25].

On appeal, however, the United States Court of Appeals for the Fifth Circuit reversed, holding that Georgia's statutory co-conspirator exception to the hearsay rule, as construed by the Supreme Court of Georgia, was repugnant to the Sixth Amendment. [R. 132, Appendix, p. 38]. Noting that the Supreme Court of

the United States had not yet adequately explained "how and when a state hearsay rule exceeds permissible constitutional grounds" [R. 128, Appendix, p. 33], the Court of Appeals proceeded to fashion a test of its own. Apparently adopting as its starting point the view that all hearsay evidence is *per se* a denial of the right of confrontation, the Court of Appeals declared that existing *State* exceptions to the hearsay rule could henceforth be permitted only where under the circumstances of the particular case involved, there are "salient and cogent reasons" to justify the consequential denial of the defendant's right to be confronted by the witnesses against him [R. 130, Appendix, p. 35]. While left unsaid the decision of the Court of Appeals makes it quite clear that the power to make the binding determination as to whether sufficiently "salient and cogent reasons" exist for application of a *State* evidentiary rule in a *State* criminal proceeding, is now to be the *Federal* judiciary, in what must necessarily become routine appellate review and supervision via *habeas corpus* proceedings. The "confrontation clause" of the Sixth Amendment, in other words, has not only been expanded in merely so sweeping a manner as to completely envelop and ossify the hearsay rule into a constitutional mandate, but has indeed been expanded beyond the traditional hearsay rule *coupled with its traditional exceptions,* to the point where even the most widely accepted and settled State law exceptions are to be nullified unless in the eyes of the particular Federal judge or judges reviewing a State conviction, admission of the evidence in question, under the particular circumstances presented, was justified by some "salient and cogent reason."

It goes without saying that the case is one of first impression before the United States Supreme Court.

ARGUMENT

1. The hearsay rule, with all of its subtleties, anomalies and ramifications ought not to be read into and equated with the "confrontation clause" of the Sixth Amendment?

Until now it has never been supposed that the hearsay rule, along with all of its twists and turns, was a constitutional mandate. The traditional view of the "confrontation clause" of the Sixth Amendment has been that it was designed to prevent an accused from being tried upon *ex parte* affidavits or depositions, and require instead that the witnesses who testify against him do so face to face at the trial where they are subject to cross examination. See e.g., *Dowdell v. United States*, 221 U.S. 325, 330 (1911). Until now it was not thought that this constitutional requirement went so far as to control the nature or scope of oral testimony permitted to be given by a witness who is in court and subject to cross examination.[3] This latter aspect of the introduction of evidence in a criminal proceeding has heretofore been left to that far broader evidentiary rule generically described as the hearsay rule. Thus *Wigmore* states:

> "The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially, — this depends

[3]As already pointed out, the witness Lynwood W. Shaw, to whose testimony Appellee Evans objected, testified in open court in the presence of the accused and not only was available for but was indeed subjected to a thorough cross-examination. Evans' objection related solely to the scope of Shaw's testimony (i.e. Shaw's being allowed to testify as to his audio as well as visual perceptions).

on the law of Evidence for the time being, — but only what mode of procedure shall be followed — i.e. a cross-examining procedure — in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially." 5 Wigmore, *Evidence*, § 1397 p. 131 (3d ed. 1940).

This critical distinction between the *competency of testimony* under existing rules of evidence (i.e. hearsay), and the constitutionally required *procedure* by which testimony must be introduced (i.e. through live witnesses who confront the accused and are thus available for cross examination rather than by means of affidavits or depositions), was noted by the Supreme Court of Ohio at least as early as 1856, when it said in *Simmons v. Ohio*, 5 Ohio State 325, 341 (1856):

> "The requirement that the accused shall be confronted, on his trial, by the witnesses against him, has sole reference to the personal presence of the witness, and it in nowise affects the question of the competency of the testimony to which he may depose. When the accused has been allowed to confront, or meet face to face, all the witnesses called to testify against him on the trial, the constitutional requirement has been complied with."

Similarly the Supreme Judicial Court of Massachusetts observed in *Commonwealth v. Gallo*, 275 Mass. 320, 333, 175 N.E. 718, 724 (1931):

> "It [the constitutional requirement] was not designed to affect the settled rules of the common law for determining the competency of evidence under the principle of confrontation of the accused by the witnesses. The general rules of the common law, founded as they are upon 'justice, fitness and expediency,' are designed to meet and be susceptible of being adopted 'to new institutions and conditions

> of society . . . new usages and practices, as the progress of society in the advancement of civilization may require.' "

Thus, says Wigmore, there is no inconsistency between the gradual revision and extension of the various exceptions to the hearsay rule and the constitutional sanction. See 5 Wigmore, *Evidence* § 1397 p. 135 (3d Ed. 1940).

In *Mattox v. United States*, 156 U.S. 237, 241-42 (1895) this Court similarly indicated that the narrower constitutional standard was not to be equated or confused with the broader evidentiary rule. It was said there of the "confrontation clause" of the Sixth Amendment:

> ". . . that provision was made to exclude any evidence by deposition, which could be given orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of common law."[4]

And more recently, in *Stein v. New York*, 346 U.S. 156, 196 (1953), this Court, in reviewing a State murder conviction, flatly rejected a similar attempt to elevate the hearsay rule to a constitutional requirement, saying:

> "The hearsay-evidence rule, with all of its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment."

This is not to contend, of course, that the constitutional standard and broader evidentiary rule are always mutually exclusive. In some instances they obviously do overlap, with certain types of hearsay evidence being of such nature as to fall within the more restricted pe-

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[4]See also *Douglas v. Alabama*, 380 U.S. 415, 418-19 (1965).

numbra of the "confrontation clause." In light of the primary purpose of the constitutional standard being one of preventing trial in criminal cases by *ex parte affidavits or depositions,* for example, it is hardly surprising to find that the admission of documentary hearsay may in some situations be violative of the constitutional right of an accused to confront the witnesses against him. See e.g., *Barber v. Page,* 390 U.S. 719 (1968); *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965). Unlike a live witness a piece of paper cannot be cross-examined.

It is unfortunate yet understandable that the relationship and distinctions between the evidentiary rule and constitutional standard have until now received but a paucity of treatment in the Federal Judiciary. In the Federal courts it obviously mattered little to a criminal defendant whether he obtained reversal by virtue of the court's exercise of its supervisory power respecting an evidentiary rule (i.e. "hearsay") or through the application of a constitutional mandate (i.e. "confrontation"). It is probably accurate to say that the distinction was rather academic in the Federal courts prior to 1965 when *Pointer* first held the "confrontation clause" to be applicable to the States under the Fourteenth Amendment.

But whatever the post-*Pointer* uncertainty may be, Appellant is unaware of any authority supporting the position adopted by the Court of Appeals. By one decision that court has not only expanded the penumbra of the "confrontation clause" to cover all forms and types of hearsay, but has indeed decided that the constitutional requirement goes even further, raising serious questions

as to the continuing validity of even the most settled State exceptions to the heretofore evidentiary rule. According to the Court of Appeals for the Fifth Circuit all such generally accepted exceptions must now be "continually scrutinized and reevaluated" by the *Federal courts* to see if "salient and cogent reasons" existed in each given case to justify their application and the consequential deprivation (according to the Court of Appeals) of an accused's right to confront the witnesses against him. It is assumed, of course, that the Court of Appeals did not intend to disturb those hearsay exceptions recognized by the Federal courts respecting Federal criminal proceedings and that these would continue as automatic exceptions to the "confrontation clause." But such charity is apparently inapplicable to State criminal proceedings. There any application of a State law exception to the hearsay rule must be made by the State trial judge at the peril of a Federal judge deciding sometime in the future that to his way of thinking the State law hearsay exception, under the particular factual situation presented, should not have been applied.

Seemingly the only point of hesitation by the Court of Appeals in its revision of the law of evidence of the various States is the fact that this Court, when applying the "confrontation clause" to the States in *Pointer v. Texas*,[5] failed to go so far. Thus the opinion of the Court of Appeals laments the fact that:

> ". . . neither *Pointer* nor any subsequent decision adequately explains how and when a state hearsay rule exceeds permissible constitutional bounds." [R. 128, Appendix, p. 33].

It might humbly be suggested that perhaps this omis-

[5] 380 U.S. 400 (1965).

sion on the part of this Court is due to the fact that it never imagined that *Pointer* and/or subsequent decisions would be construed as having *wholly* overruled *Stein v. New York*, 346 U.S. 156, 196 (1953), causing the hearsay rule, either with or without its traditional exceptions, to be read into and equated with the "confrontation clause" of the Sixth Amendment.

Certainly it is safe to say that of all of the rules of evidence which could have been selected for elevation to the dignity of a constitutional mandate it would be exceedingly difficult to find one less suitable and less deserving than the hearsay rule. This so-called rule, which has so many exceptions as to render its applicability at least as exceptional as the exceptions, has probably been subjected to more criticism than any other evidentiary rule in existence. Many writers have argued for its outright abolition as a senseless anachronism which by excluding evidence which is both relevant and reliable, more frequently impedes than furthers justice. See, e.g., Weinstein, *Alternatives to the Present Hearsay Rule*, 44 F.R.D. 375 (1967) *Hearsay in Administrative Hearings*, 32 Geo. Wash. L. Rev. 689 (April 1964). Obviously this is the trend in civil proceedings. It is now the general rule in administrative hearings, for example, that hearsay *is* admissible. As stated in *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 690 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949), where hearsay evidence not within any of the recognized exceptions was nonetheless admitted over objection:

> "*The common law exclusionary rules of evidence are not based in constitutional interdictions* and are not applicable to administrative proceedings, even of judicial character, in the absence of statutory requirement." (Italics added.)

Inasmuch as the Sixth Amendment is applicable to the States solely through the fundamental fairness concept of the "due process" clause of the Fourteenth Amendment, and inasmuch as the requirement of "due process" is applicable to both criminal and civil proceedings, it may appropriately be asked how and why the admission of oral hearsay evidence manages to "shock the conscience" or violate "the very essence of a scheme of ordered liberty"[6] in a criminal proceeding while at the same time being deemed perfectly proper in a civil action? Is not the function of the rules of evidence in both civil and criminal proceedings to ascertain the truth? Appellant submits that if anything shocks the conscience it ought to be the retention, not to mention the proposed elevation to a constitutional mandate, of a rule which is unknown in any system of civilized law other than the Anglo-American system, a rule which is roundly criticized by apparently *all* of the leading evidence scholars of the Anglo-American System, and a rule which is at odds with what one would think to be a valid constitutional goal of getting as close an approximation of the truth as possible. See Weinstein, *Alternatives to the Present Hearsay Rule,* 44 F.R.D. 375 (1967); *Hearsay in Administrative Hearings,* 32 Geo. Wash. L. Rev. 689 (April 1964).

In noting the existing confusion concerning the extent to which the hearsay rule and right of confrontation overlap, the writers agree that the two ought not to be equated. The Constitution is too blunt an instrument to regulate the procedural and evidentiary details of criminal prosecutions. See *Friendly, The Bill of Rights as a*

[6]See, e.g., *Rochin v. California,* 342 U.S. 165, 169, 172 (1952); *Bute v. Illinois,* 333 U.S. 640, 659 (1948).

Code of Criminal Procedure, 53 Calif. L. Rev. 929, 953-54 (1965). And in expressing reservations concerning certain language of *Pointer v. Texas* it was said in *Confrontation and the Hearsay Rule*, 75 Yale L. J. 1434, 1436 (1966):

> "Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rule of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well."

In concluding discussion of what we deem to be the Court of Appeals' initial error of expanding the "confrontation clause" so as to cover all hearsay, it must again be stressed that the present case does not involve hearsay consisting of written testimony taken outside the courtroom. Nor does it involve hearsay respecting any sort of extended opinion evidence. The witness Shaw, in court and confronting the accused, testified that in response to his question to Williams he received a particular utterance or exclamation. Constitutionally speaking, Appellant finds it difficult to understand why such testimony as to *what he heard* should be any less favorably received than testimony as to *what he saw*. Both are perceptions through sensory organs. We doubt that the courts would be impressed by argument that the "confrontation clause" prohibits a witness from testifying as to the observed phy-

sical reaction of an individual to a particular question, e.g., flushed face, scowl, or state of rage. Why should testimony as to observed verbal reaction, particularly where as here it is much in the nature of a spontaneous "ouch," be any less constitutional? We think generally speaking that the "confrontation clause" ought not to be expanded to cover all hearsay evidence, and more specifically that it should not in any event be construed so as to prohibit testimony of the sort involved in this case whether or not it was properly admitted under a "recognized" State or Federal exception to the rule.

2. In the event that the hearsay rule is to be construed as a constitutional mandate under the Sixth Amendment, its application to the States under the Fourteenth Amendment ought not be such as to require that the nature and scope of long standing State law exceptions to this heretofore evidentiary rule henceforth be restricted to such exceptions and applications as may at some later date be thought desirable under the particular circumstances of the case presented by a reviewing Federal Judge.

However unfortunate the reading of the hearsay rule into the "confrontation clause" may be in and of itself, the far greater blow to any orderly disposition of criminal cases in State courts lie in the approach of the Court of Appeals toward long standing rules of evidence of the various States respecting exceptions to the hearsay rule. Taking a rather expansive view of *Barber v. Page*, 390 U.S. 719 (1968), the Court of Appeals construed that decision as requiring:

". . . . that the rationale of hearsay exceptions in

criminal cases must be continually scrutinized and reevaluated" [R. 129, Appendix, p. 34].

and then proceeded to fashion as its test for the constitutionality of State hearsay exceptions, the yardstick of whether or not any exception, under the particular circumstances of the case presented, is to the reviewing Federal court's way of thinking justified by "salient and cogent reasons" [R. 130, Appendix, p. 35]. While left unsaid, it must be obvious that this nebulous to say the least standard is in reality nothing less than a transfer from the legislatures and courts of the *States* to the *Federal* judiciary of the power to make policy judgments as to whether a hearsay exception recognized by *State* law should be allowed in any given *State* criminal proceeding.

The disruptive effect of this sort of Federal "second guessing" upon the trial of criminal cases in State courts is not difficult to foresee. No matter how settled a State's rules of evidence may be regarding the hearsay rule, a State trial judge will rarely if ever be able to know in advance whether or not a United States District Court Judge might concude during a subsequent habeas corpus review, perhaps some years later, that under the particular circumstances of the case the reasons for admitting the evidence were not sufficiently "salient and cogent." In view of the difficulty, if not impossibility, of recognizing and excluding all hearsay evidence during the heat of trial, it would be difficult to see how any conviction could ever stand without multiple State court trials and multiple Federal reviews upon habeas corpus "appeals." This Court has already indicated that only a knowing waiver of confrontation rights by an accused will suffice, see *Barber v. Page*, 390 U.S. 719, 725 (1968);

Brookhart v. Janis, 384 U.S. 1, 4-8 (1966), and if hearsay evidence is a denial of the right to confrontation *per se* as the Court of Appeals concludes, it must be assumed that such hearsay as counsel inadvertently or even deliberately fails to object to will (unless such unconstitutionally admitted evidence can be construed to be "harmless error") pollute the entire trial. If it has really come to this, Appellant respectfully submits that in order to save time and money for the Federal and State courts, for counsel, the accused and the taxpaying public, it would be far better to simply have all State criminal violations tried in the Federal courts in the first instance.

If the Court of Appeals is correct in its major premise that "hearsay" and "confrontation" are the same (we insist they are separate and distinct), it is obvious that some intelligible *objective* standards are needed by State trial courts so as to remove the matter from the quagmire into which it has been dropped and in which it now rests. The "second guessing" approach adopted by the Court of Appeals (for application to State courts only) clearly fails to furnish such standards as will permit the orderly disposition of State criminal trials.

3. The Court of Appeals erred in holding that the State statute providing for the co-conspirator exception to the hearsay rule (i.e. Ga. Code Ann. § 38-306), as construed by the Supreme Court of Georgia to cover the period during which a conspiracy continues for the purpose of concealing a crime, is repugnant to the "confrontation clause" of the Sixth Amendment.

The unwisdom of attempting to read the hearsay rule

into the "confrontation clause" of the Sixth Amendment and even greater unwisdom of attempting to subject well settled State exceptions thereto to the amorphous test recommended by the Court of Appeals is well illustrated by the facts and applicable evidentiary law respecting the instant case.

As already pointed out the factual situation is one of a witness testifying in court that when he asked a co-conspirator a particular question he received in reply an exclamation in the nature of an "ouch," which to some slight degree also implicated the accused. In showing that under the generally applicable rules of evidence it was entirely proper to admit such testimony, it may first be noted that it is the rule everywhere that out-of-court declarations of a co-conspirator are ordinarily admissible in the trial of another conspirator. E.g., 22A C.J.S. *Criminal Law* § 754; 31A C.J.S. *Evidence* § 362 (both citations noting that the extent to which the declarations are admissible is to a great extent within the discretion of the trial court). This exception to the hearsay rule has repeatedly been recognized by this Court. E.g., *Schine Chain Theatres, Inc. v. United States,* 334 U.S. 110, 116-117 (1948); *Hitchman Coal & Coke Co. v. Mitchell,* 245 U.S. 229, 249 (1917). In Georgia it is provided for by statute. Ga. Code Ann. § 38-306 declares:

> "After the fact of conspiracy shall be proved the declarations of any one of the conspirators during the pendency of the criminal project shall be admissible against all."

Concerning the nature of the declaration, the only requirement is one in the nature of relevancy. It must re-

late to the conspiracy or acts done in furtherance of the conspiracy. As stated in *United States v. E. I. Du Pont de Nemours & Co.*, 107 F.Supp. 324, 325 (D. Del. 1952):

> "A declaration of a co-conspirator is admissible even though made only to other members of the co-conspirator's organization or to other third parties. Du Pont contends, however, the criterion of admissibility of the declaration is 'the making' and the statement can only come in if 'the making' is itself 'in furtherance of the conspiracy'. I think it sufficient for purposes of admissibility if the subject matter of the co-conspirator's admission relates to the purpose of the conspiracy *or is explanatory of acts done in furtherance of the conspiracy. Thus, a statement by a co-conspirator to a third party concerning some act done in furtherance of the conspiracy is admissible although the actual making of the statement in no way furthered the conspiracy.*" (Italics added.) [7]

A second generally recognized limitation, and one which is expressly included in the Georgia statute, is that the declaration must be made during the pendency of the conspiracy. Here, however, a divergence of opinion appears. The general rule appears to be that pendency includes both the period of planning prior to the time of the overt act or acts *and the subsequent period where the thrust of the criminal project is to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense.* E.g., *Reed v. People*, 156 Col. 450, 402 P.2d 68, 71 (1965); *Smaldone v. People*, 103 Col. 498, 88 P.2d 103 (23) (1939); *Dailey v. State*, 233

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[7]See also *Wiborg v. United States*, 163 U.S. 632, 658 (1896) (noting that the admissibility of such evidence is largely within the discretion of the trial court).

Ala. 384, 171 So. 729, 731 (1937); *State v. Roberts*, 95 Kan. 280, 147 P. 828 (8) (1915); 16 C.J. *Criminal Law* § 1318, pp. 661-62; 22A C.J.S. *Criminal Law* § 770, pp. 1165, 1167. As stated in 2 Wharton, *Criminal Evidence* § 430 (12th ed. 1955):

> "The acts and declarations of a conspirator are admissible against a co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense, but also its subsequent concealment.
>
> . . . .
>
> "The theory for the admission of such evidence is that persons who conspire to commit a crime, and who do commit a crime, are as much concerned, after the crime, with their freedom from apprehension, as they were concerned, before the crime, with its commission: the conspiracy to commit a crime devolves after the commission thereof into a conspiracy to avoid arrest and implication."

Georgia has long followed the general rule, e.g., *Chatterton v. State*, 221 Ga. 424 (5), 144 S.E.2d 726 (8) (1965), *cert. denied*, 384 U.S. 1015 (1966); *Carter v. State*, 106 Ga. 372, 376-77, 32 S.E. 345, 347 (1899); *Byrd v. State*, 68 Ga. 661, 662 (1881), and when Appellee in the instant case urged his objection to the Supreme Court of Georgia, that Court, after first quoting the pertinent statute (i.e. Ga. Code Ann. § 38-306), rejected his assertion, saying:

> "The rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered

so much a unit that the declarations of either are admissible against the other."[8]

It is recognized, of course, that the co-conspirator exception has been restricted to a narrower scope in the Federal courts. There the conspiracy is viewed as terminating with the completion of the last overt act in furtherance thereof. E.g., *Grunewald v. United States*, 353 U.S. 391, 399-402 (1957); *Krulewitch v. United States*, 336 U.S. 440, 443-444 (1949); *Fiswick v. United States*, 329 U.S. 211, 217 (1946). But the rule has not heretofore been interpreted as a rule of constitutional dimension. Quite to the contrary, this Court expressly noted in *Krulewitch* that it was dealing simply with an *evidentiary rule* to be applied in the Federal courts and took cognizance of the fact that many States, including Georgia, did adhere to the view that "pending" included the period during which the conspirators sought to conceal the crime. See *Krulewitch v. United States, supra* at 443-44.

Moreover, assuming that the Court of Appeals is not attempting to reverse the previously cited decisions of this Court which do allow the admission into evidence of at least those co-conspirator declarations which clearly are made prior to the time of the last overt act of the conspiracy, it would seem to Appellant to be a strange constitutional doctrine which would cause admissibility of co-conspirator Williams' declaration to turn on "time of utterance," which is to say whether it was made before or after the last overt act. Such an artificial criterion obviously bears little relationship to the "trustworthiness" rationale which is usually employed to justify

[8] *Evans v. State*, 222 Ga. 392, 402, 150 S.E.2d 240, 248; *cert. denied*, 385 U.S. 953 (1966).

hearsay exceptions. As pointed out by the Supreme Court of Georgia on direct review:

> "The defendant, and his co-conspirator Williams, at the time this statement was made, were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt." *Evans v. State,* 222 Ga. 392, 402, 150 S.E.2d 240, 248, *cert. denied,* 385 U.S. 953 (1966).

The "trustworthiness" of the declaration lies in the fact that it was a spontaneous exclamation and declaration against Williams' penal interest. Statements against penal interest of this nature are ordinarily not uttered unless true. See *Newberry v. Commonwealth,* 191 Va. 445, 61 S.E.2d 318, 326 (1950); 31A C.J.S., *Evidence* §§ 217, 219, p. 688; *Accord, Opper v. United States,* 348 U.S. 84 (1954). Surely the level of "trustworthiness" here is greater than in the case of the "dying declaration" exception to the hearsay rule which has been recognized by this Court in *Mattox v. United States,* 146 U.S. 140, 151 (1882) and *Pointer v. Texas,* 380 U.S. 400, 407 (1965). In the latter situation "trustworthiness" rests primarily upon the somewhat questionable assumption that a person about to die will not lie. See 5 Wigmore, *Evidence* § 1438 (3d Ed. 1940). And how much more reliable is the instant hearsay than that regarding a person's "reputation in the neighborhood," so frequently admitted in criminal proceedings. See 22A C.J.S. *Criminal Law* § 676; 32 C.J.S. *Evidence* §§ 434, 436. Of such reputation evidence this Court correctly observed in *Michelson v. United States,* 335 U.S. 469, 477 (1948):

> "Not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not al-

> lowed to base his testimony on anything but hearsay . . . The witness may not testify about defendant's specific acts or courses of conduct . . . nor can he testify that his own acquaintance, observation, and knowledge of defendant leads to his own independent opinion that defendant possesses a good general or specific character, unconsistent with commission of acts charged. This witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge them himself."

Appellant submits that if the declaration of a co-conspirator against his penal interest in the case at hand cannot pass muster under the confrontation clause, it would be most illogical to hold that the above cited and other less reliable forms of admissible hearsay can.

Finally, it is respectfully submitted that it is of no small importance, particularly in times of mass disorder and group lawlessness, that the States be permitted to retain the broader concept of the co-conspirator exception. One illustration of the salubrious nature of construing the term "pendency" so as to include the period of concealment of the crime is *Bryant v. State,* 65 Ga. App. 523, 16 S.E.2d 241 (1941). There it was shown that members of the Ku Klux Klan, including the defendant on trial, had conspired to flog certain individuals. The Court of Appeals held that one of the victims, appearing as a witness, could properly testify that on the morning after he was flogged (i.e. after the primary object or final overt act of the conspiracy took place), he had been warned by one of defendant's co-conspirators not to say anything about the flogging or he might receive an even worse beating. Such testimony relating to the post overt-act period where there exists

agreement or concert of action to conceal the crime can in many cases be of considerable assistance in shedding light on the matter. Since this is the purpose of all evidence Appellant submits there is no valid policy reason to eliminate this long standing exception to the hearsay rule and that the Court of Appeals erred in holding Georgia's statute, as construed by its Supreme Court, to be unconstitutional.

4. The Court of Appeals erred in reversing the United States District Court in that the testimony in question, in light of the totality of the evidence presented, was so minuscule as to render its admission "harmless error" even if it were to be held to have been improperly admitted under the hearsay rule and/or "confrontation clause" of the Sixth Amendment.

It has frequently been held that where the guilt of an accused is established beyond a reasonable doubt by competent evidence, the admission of other evidence which is for some reason incompetent is not prejudicial to an accused and does not constitute ground for reversal, particularly where the improperly admitted evidence is merely corroborative. See *Segurola v. United States,* 275 U.S. 106 (3) (1927); 24B C.J.S. *Criminal Law* § 1915 (5). It is Appellant's contention that even if the Court of Appeals was correct in its view that the Sixth Amendment's "confrontation clause" must now be expanded to cover all hearsay evidence, the testimony here in question was such a minuscule part of the overwhelming mass of evidence of Appellee's guilt as to preclude any possibility that it could even remotely have affected the jury's verdict. A study of the record makes

it clear beyond all doubt that Appellee was convicted by the testimony of an accomplice who was an eye witness to the murders, with such testimony being corroborated by an abundance of physical evidence plus the testimony of numerous other witnesses. The somewhat cryptic but possibly mildly implicating testimony of the witness Shaw to which Appellee objected was entirely corroborative in nature and far less than the proverbial drop in the bucket of the State's evidence. Looking at the record as a whole it is obvious that no substantial risk exists of Appellee Evans having been prejudiced by the particular exclamation in question.

It is respectfully submitted that under all of the facts and circumstances of this case, reversal on the ground that constitutional error, if any, was "harmless error," would be consistent even under the restrictive view of the doctrine which this Court enunciated in *Chapman v. California,* 386 U.S. 18, 23-24 (1967) and *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963).

CONCLUSION

This case presents substantial questions as to the meaning of the Sixth Amendment's "confrontation clause" and the extent to which the heretofore evidentiary rules of the States respecting hearsay may continue to be utilized in State criminal proceedings. In the absence of reversal or considerable clarification of the nebulous standards which have been adopted by the Court of Appeals for the Fifth Circuit, that Court's decision will at the very least prove to be extraordinarily disruptive to the orderly disposition of criminal proceedings in the State courts for all of the reasons stated. The

judgement of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 829

A. L. DUTTON, Warden, Georgia State Prison,
Reidsville, Georgia,
Appellant,

vs.

ALEX S. EVANS,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF APPELLEE

We have previously filed a Motion to Affirm the judgment below. For the reasons stated therein, we urge the Court to grant the motion, pursuant to Rule 16 of this Court, and affirm the judgment from which this appeal is prosecuted.

It is noted that in its supporting brief, Appellant has presented nothing new, but has reiterated its argument contained in the Jurisdictional Statement previously filed. Accordingly, our argument here will be substantially the same as was urged in our Motion to Affirm.

To place in context the decision of which Appellant complains, Appellee was on trial for the offense of murder. He was jointly indicted with Williams, who had already been tried and sentenced to death, and with one Truitt. The latter furnished the only substantial evidence against Appellee. His testimony was given under the terms of a written agreement with the State, under which he was guaranteed immunity from prosecution for the triple murder of three police officers and other rewards.

The witness Shaw was permitted to testify that a few weeks before the trial, Williams, who, like Shaw, was at the time a federal prisoner, had been taken to Gwinnett County, Georgia, for arraignment. After Williams was returned to the federal penitentiary, Shaw inquired of him as to how he had made out at the arraignment. Williams replied, "If it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." Counsel for Appellee timely objected to this testimony, before and after its admission into evidence, invoking among other objections the federal constitutional right to confrontation (Appendix 49-51, 55). Proper and timely objection having been made to such evidence, the Court of Appeals correctly held that this particular hearsay evidence denied Appellee his Sixth Amendment right to confrontation.

Patently, the statement attributed by Shaw to Williams was an accusation by Williams that Appellee was responsible for the three murders, that he was guilty of the offense for which he was on trial. In effect, this was

a "confession" by a co-defendant that Appellee was a participant in the murders and was guilty. Under no concept could it be contended that the extra judicial, ex parte statement of Williams was in furtherance of an alleged conspiracy to commit murder. We do not understand Appellant to urge that it was.

In making its ruling, the Court of Appeals held that, under the facts of this case, Georgia Code Section 38-306, as construed by the Supreme Court of Georgia and applied in this case, is repugnant to the Sixth Amendment. That code section provides:

> "After the fact of conspiracy shall be proved, the declarations of any one of the conspirators during the pendency of the criminal project shall be admissible against all."

ARGUMENT AND CITATION OF AUTHORITIES

While Appellant has presented its argument under the form of four questions presented, in reality only two questions present themselves. The first is whether Appellee was denied constitutional confrontation. The second is whether the denial of such confrontation was harmful to Appellee. We will consider these issues in the order presented.

I.

Confrontation

There can no longer be any question but that an accused in a criminal case, save in exceptional circumstances, is entitled to be confronted by his accusers and to exercise his right of cross-examination. *Pointer* v. *Texas*, 380 U.S. 400; *Douglas* v. *Alabama*, 380 U.S. 415; *Brookhart* v. *Janis*, 384 U.S. 1; *Bruton* v. *United States*, 391 U.S. 123; *Roberts*

v. *Russell*, 392 U.S. 293; *Flores* v. *United States*, 5 Cir., 379 F.2d 905; *United States* v. *Lyon*, 7 Cir., 397 F.2d 505, 510; and *Serio* v. *United States*, DC Cir., 401 F.2d 989. The cited authorities and those decided under their teaching advise that these rights are inalienable and that they may be neither eroded nor emasculated by indirection or subtlety.

The Georgia statute in question, Georgia Code Section 38-306, as construed by the Supreme Court of Georgia and applied in this case, has the effect of infringing these rights. It would probably serve no useful purpose here to give a detailed discussion of the history and development of the criminal conspiracy law of Georgia, but perhaps it would be enlightening to refer to some of its characteristics as it existed at the time of the trial. There was no general "conspiracy" statute at that time. A conspiracy could be proved, though not alleged in the indictment. *Dixon* v. *State*, 116 Ga. 186(8), 42 S.E. 357; *Whitaker* v. *State*, 159 Ga. 787(5), 127 S.E. 106. The common-law crime of conspiracy did not exist in Georgia. In effect, proof of a conspiracy was in reality a rule of evidence and a means of proving the accomplishment of the criminal act. *Bishop* v. *State*, 118 Ga. 799(4), 45 S.E. 614; *Nobles* v. *State*, 98 Ga. 73, 26 S.E. 64.

In this situation, the statutory provision in question developed from decisional law and was later codified. As previously stated, it provides that, "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." It is to be noted that in context there is no requirement that such declaration be in *furtherance* of the conspiracy.

Another statute, Georgia Code Section 38-414, provides:

> "The confession of one joint offender or conspirator, made after the enterprise is ended, shall be admissible only against himself."

However, the latter rule is unavailing, as the Supreme Court of Georgia has consistently held, as it did in Appellee's case, *Evans* v. *State*, 222 Ga. 392, 402, 150 S.E.2d 240, that a conspiracy, by its nature, includes as a part thereof an agreement to conceal the fact that a crime has been committed and the identity of the perpetrators of the offense. *Chatterton* v. *State*, 221 Ga. 424(5), 144 S.E.2d 726. Thus, under the statutory law, as applied by the Supreme Court of Georgia, incidentally, contrary to *Grunenwald* v. *United States*, 353 U.S. 391, until the conspirators are tried and convicted, the conspiracy is deemed to continue and any declaration of one conspirator is admissible against the other, regardless of whether such declaration is in furtherance of the conspiracy or not. *Evans* v. *State*, supra. For example, under the rulings of the Supreme Court of Georgia, which it followed in the present case, in *Darden* v. *State*, 172 Ga. 590, 158 S.E. 414, a confession made by a co-defendant not on trial, implicating the defendant on trial, although not made in his presence, was nevertheless held admissible against him. The court, after quoting the applicable code section, stated:

> "Under the evidence in the case the jury was authorized to find that there was a conspiracy entered into by the three defendants, who were jointly indicted, to kill (the deceased), and the statements admitted into evidence were declarations of one of the conspirators during the pendency of the criminal project."

Parenthetically, we note that under this rule, on the trial of one of two persons jointly indicted, the declarations of the other that he alone committed the offense with which they are charged are not admissible in evidence in favor of

the accused on trial. *Robison* v. *State*, 114 Ga. 445, 40 S.E. 253; *Parks* v. *State*, 24 Ga. App. 243, 100 S.E. 724.

It is observed that in earlier cases the Supreme Court of Georgia construed the statute differently, in that it held that declarations of a co-conspirator, to be admissible against one on trial, must not only have been made during the pendency of the conspiracy, but also must have been made *in furtherance of its object*. *Wall* v. *State*, 153 Ga. 309, 112 S.E. 142 (1922). This rule has long since been abandoned, although it is consistent with the federal rule followed ever since *Logan* v. *United States*, 144 U.S. 263, 309.[1] There can be no contention and none has been made by Appellant that the statement attributed to Williams, the co-defendant not on trial, was in any remote way in furtherance of the conspiracy contended for by the State. As the Court of Appeals observed in footnote 22 of its opinion, quoting from *Fiswick* v. *United States*, 329 U.S. 211, 217, a "confession or admission of one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it."

In his brief, at pages 21-22, Appellant concedes that in order for a declaration, such as that with which we are concerned, to be constitutionally admissible under the facts of this case, "It must relate to the conspiracy or acts done in furtherance of the conspiracy." This statement is then followed by the citation of and quotation from the opinion of a District Court *civil* case. This isolated lower Court opinion in a civil case could hardly be said to support any logical contention that the Williams' declaration was, or

1. "Doubtless in all cases of conspiracy the act of one conspirator *in the prosecution of the enterprise* is considered the act of all, and is evidence against all. *United States* v. *Gooding*, 25 U.S. 12, 12 Wheat. 400, 409. But only those acts and declarations are admissible under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object." (Emphasis supplied).

could be held to be, an utterance in furtherance of the conspiracy here involved. This is particularly true in view of *Logan* v. *United States*, supra; *Pinkerton* v. *United States*, 328 U.S. 640, 646; *Fiswick* v. *United States*, supra; *Brown* v. *United States*, 150 U.S. 93. See cases cited and discussion in *Gambino* v. *United States*, 3 Cir., 108 F.2d 140.

Appellant has devoted a great portion of his argument to the proposition that involved here is nothing more than a deviation or ramification of the "hearsay rule". While the argument and suggestions flowing so freely therefrom to some extent tend to obfuscate the real and decisive issue, a denial of confrontation is none the less so because it is the result of hearsay evidence. This Court, in the cases cited hereinbefore, i.e., *Pointer*, *Douglas*, *Brookhart*, *Bruton* and *Roberts*, has decided this issue. The present appeal presents nothing novel nor suggestive that those decisions of this Court should be reviewed or overruled. On the basis of them, the judgment of the Court of Appeals should be affirmed.

In *Pointer* v. *Texas*, 380 U.S. 400, there was introduced into evidence a transcript of a witness' testimony given at a preliminary hearing, at which the defendant was not represented by counsel and did not avail himself of the right to cross-examine the witness. The witness had subsequently moved out of the state with no intention to return. This Court held that the Sixth Amendment right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the states by the Fourteenth Amendment. It held further, that under the facts of the case, the use of the transcript constituted a denial of the defendant's constitutional right of confrontation. At the same time, this Court decided *Douglas* v. *Alabama*, 380 U.S. 415. In that case, as here, an accomplice

had been found guilty in a previous separate trial. When called as a witness in defendant's trial, he invoked his privilege against self-incrimination. Thereupon, the prosecuting attorney produced a confession signed by the accomplice and, in the guise of cross-examination to refresh the witness' recollection, read from the document. The accomplice continued his refusal to testify, although he was asked periodically by the prosecuting attorney whether he made the statement which was being read in the presence of the jury. Thereafter, law enforcement officers who identified the document as the accomplice's confession, were called as witnesses. The document itself was not offered into evidence. This Court again held that the confrontation clause of the Sixth Amendment is applicable to the states. It further held that the facts stated above constituted a denial of such right.

While the *Pointer* case is not in direct point with the case under review, it does establish that the accused's right to confront witnesses against him is a fundamental right, essential to a fair trial and that this right is obligatory on the states. It further establishes that the right to confrontation will be enforced against the states, according to the same standards that protect this right against federal encroachment. A major reason underlying the constitutional confrontation rule is to give the defendant in a criminal case an opportunity to cross-examine the witnesses against him. In reaching this decision, this Court recognized that there are certain exceptions based primarily upon necessity. In recognition of these exceptions, it cited *Mattox* v. *United States*, 146 U.S. 140; *Mattox* v. *United States*, 156 U.S. 237; and *Dowell* v. *United States*, 221 U.S. 325, upon which Appellant so strongly relies. This Court found no inconsistency between those cases and its ruling in the *Pointer* case. There is none.

In *Douglas* v. *Alabama*, supra, the facts are not, in effect, dissimilar from those presented here for review. We submit that in that case the vice found by this Court did not necessarily involve the fact that the prosecuting attorney had in his possession a written document which was identified as a statement given by the accomplice. As a matter of fact, the written document was not introduced into evidence. The true vice was the denial of confrontation afforded by the procedure there used which permitted the prosecuting attorney to recite an extra judicial, ex parte statement made by the accomplice. In that case, as here, the statement which was recited by the prosecuting attorney was accusatory in nature and named the defendant on trial as the person who actually fired the blast which wounded the victim. We think it of no significance that it was the prosecuting attorney who recited the statement of the accomplice; the result would have been the same had one of the officers been permitted to recite the statement, or, for that matter, had a fellow prisoner of the accomplice been permitted to testify with regard to it.

In *Brookhart* v. *Janis*, 384 U.S. 1, this Court held that the introduction as evidence against a defendant of an alleged confession, made out of Court by one of his co-defendants, who did not testify in Court, denied the defendant an opportunity "*to confront and cross-examine the witness who made this very damaging statement.*" (Emphasis supplied). The Reporter does not indicate whether the alleged confession was physically admitted into evidence as a document or whether it was merely recited by the officer or other person who secured it from the co-defendant. Apparently, this detail was deemed insignificant by this Court, as we assume it to be. Surely, the form of the testimony, whether oral or in physical form, is unimportant. In either form, the defendant is denied the

right of confrontation. What is significant is that the defendant was denied confrontation and that concomitant right to cross-examination of *the witness who made the statement*. The same is true in the present case. While Shaw was permitted to testify and was subjected to cross-examination, Appellee was denied confrontation by the witness who made the accusatory and incriminating statement against him.

As we have stated, it is immaterial whether the improperly admitted evidence is or ever has been in the form of a written instrument. In its brief, Appellant seeks to attach some importance to the fact that the statement attributed to Williams "does not involve hearsay consisting of written testimony taken outside the courtroom." In neither *Bruton* v. *United States*, 391 U.S. 123, nor *Roberts* v. *Russell*, 392 U.S. 293, were written transcripts or written testimony involved. In both of these cases, the illegally admitted testimony related to oral statements made by a co-defendant. In the former case, the two defendants were tried jointly. An oral confession made by one of the defendants was admitted under instructions of the court that the jury could consider it only with regard to the defendant who made it. On review of the conviction of Bruton, this Court held that the admission of the co-defendant's oral confession involving Bruton was a denial of Bruton's Sixth Amendment right to cross-examination and that this encroachment upon his constitutional rights could not be avoided by a jury instruction to disregard the confession as to Bruton. The same result was reached with regard to the State Court trial in *Roberts* v. *Russell*, supra. In that case, the co-defendant had given an oral confession to an officer, admitting that he and Roberts had committed the crime. In neither of these cases was it significant that a police officer testified as to the extra judicial statement of the co-defendant, nor that the state-

ment made by the co-defendant was oral, rather than written. In both cases, the officer testifying to the oral statement was present in Court, as was Shaw in the present case, and was subject to cross-examination.

In the final analysis, it appears that it is immaterial in what manner and by what guise a defendant is denied his Sixth Amendment right to confrontation and to cross-examination. In the case under review, Appellee was, as held by the Court of Appeals, denied his right of confrontation under the facts of the case. The ruling of the Court of Appeals was correct. It should be affirmed.

II.

Was the Error Harmless?

There is no need to speculate as to whether the error was harmful. The right granted to an accused by the Sixth Amendment to confront witnesses against him includes the right of cross-examination and is made obligatory upon the states by the Fourteenth Amendment, under the authorities hereinbefore cited. *Where there has been a denial of such right, prejudice to the accused is presumed. Brookhart* v. *Janis,* supra. As observed by this Court in *Bruton* v. *United States,* an important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. In view of these recent decisions, it would appear to be unnecessary to say more on the subject; however, it is not amiss to make other supporting observations.

Before a federal constitutional error can be held harmless, "the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18. A review of the record in this case, despite Appellant's assertion to the contrary, will disclose that the conviction is based almost solely upon the

uncorroborated testimony of an accomplice who had been granted *total immunity* from prosecution in three capital offenses confessed to by him, plus assistance in securing his parole release from federal authorities on an unrelated charge. Such corroboration as is shown by the evidence relates to time, place and event, not toward connecting Appellee with the offense.

In this situation, over most strenuous objection by Appellee,[2] the State insisted that the testimony of Shaw was admissible. This arose under circumstances where the testimony was anticipated, as Williams had already been tried. Thus, at the time the constitutional question was raised, Shaw, who had been brought to court for the express purpose of giving this testimony, had not already testified. The constitutional objection having been raised, had the State at that time considered the evidence "far less than the proverbial drop in the bucket," and nonharmful and nonprejudicial to Appellee, as it now contends, surely it would have withdrawn the witness.

The testimony of Shaw, in effect, constituted an accusation by Williams, who did not confront Appellee, that Appellee was guilty of the murders. It was certainly the intention of the State that it be so construed and understood. From the manner in which it was presented, there can be no other construction. In no event can it be said that the evidence was harmless beyond a reasonable doubt.

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2. In footnote 3, page 10 of his brief, Appellant states that the objection related only to the scope of Shaw's testimony, that is, "Shaw's being allowed to testify as to his audio as well as his visual perception". We fail to grasp the connotation; however, only the conversation was at issue. Other than to say that he saw and talked to Williams, Shaw offered no testimony as to his visual perception. The objection (T. 142-144; Appendix 49), included: ". . . and to permit this witness to testify as to what somebody else told him would be in substance to permit the testimony of another witness . . . to testify through this man's lips and to deny the defendant the right of confrontation guaranteed by . . . the Constitution of the United States, Sixth Amendment. . . ."

Williams' accusation and incrimination of Appellee added substantial, perhaps even critical, weight to the State's case in a form not subject to cross-examination. The harm done Appellee cannot be estimated. As in *Douglas* v. *Alabama,* supra, it is apparent from the record before this Court that the alleged statement of Williams clearly bore on a fundamental part of the State's case against the petitioner. The record will not and does not support the assertion now urged by Appellant that the testimony of the witness Shaw was "mildly implicating" or "entirely corroborative". The effect of the prejudicial error cannot be treated so objectively.

We could write more at length, but feel that what we have said, together with the astute and well reasoned opinion of the Court of Appeals, appearing in the record and at pages 28-38 of the Appendix, suffice to refute and dispose of all of the arguments interposed by Appellant.

CONCLUSION

This Court has "followed the 'undeviating rule' . . . that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Parker* v. *Gladden,* 385 U.S. 363. The judgment below is consistent with, indeed, demanded by, this Court's prior decisions in this regard. It should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, of Counsel for Appellee, does hereby certify that he has this date served upon Counsel for Appellant a copy of the within and foregoing Brief of Appellee by mailing the same, properly stamped, United States mail, addressed: Attorney General, State of Georgia, Attention Alfred L. Evans, Jr., Esquire, 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia 30334.

This 16th day of May, 1969.

.....

ROBERT B. THOMPSON

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 10

A. L. DUTTON, WARDEN, APPELLANT

v.

ALEX S. EVANS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (App. 28–38) is reported at 400 F. 2d 826. The opinion of the district court (App. 21–25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1968, and the notice of appeal was filed on September 26, 1968. This Court noted probable jurisdiction on February 24, 1969, 393 U.S. 1076. This Court's jurisdiction rests upon 28 U.S.C. 1254 (2), the court of appeals having held the Georgia statute involved, as applied, invalid under the Sixth and Fourteenth Amendments to the Constitution.

QUESTIONS PRESENTED

1. To what extent may a State extend the traditional doctrine permitting certain out-of-court statements of one co-conspirator to be used at the criminal trial of another consistently with the confrontation requirements of the Sixth Amendment?

2. What constitutional limitations are applicable to hearsay rules applied in State criminal trials?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Sixth and Fourteenth Amendments and the Georgia evidence statute invoved in this case are set out in the Appellant's Brief at p. 3.

STATEMENT

The relevant facts are not in dispute and may be summarily stated.[1] On April 17, 1964, three police officers were found shot to death in Gwinnett County, Georgia. On August 23, 1965, appellee and Eugene Williams were charged with the murder of one of the officers, Jerry Everett. Appellee's motion for severance was granted and he was tried alone on this charge in October 1965. He was found guilty by a jury and sentenced to death.

In July 1965, Williams was incarcerated at the Atlanta penitentiary on unrelated charges. The evidence at the trial showed that when Williams returned to the penitentiary after his arraignment on the murder charge, one Lynwood Shaw, a fellow inmate who had nothing to do with the murders, asked him how he had made out. Williams replied that "if it hadn't been for

[1] A full statement appears in appellant's Brief, pp. 5–10.

that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now" (App. 55). Shaw's testimony about this statement was admitted over defense objection that it was hearsay and also excludable under the Confrontation Clause of the Sixth Amendment. The trial court found that since there had been a *prima facie* showing of conspiracy to commit car theft from which the murder followed, the statement was admissible under the Georgia statute as a declaration of a conspirator "during its continuance, before or concealment after the crime" (App. 54).[2] The Georgia Supreme Court affirmed. Relying on earlier state decisions construing the Georgia statute, it agreed that appellee and Williams, "at the time this statement was made, were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt"; the court concluded that the statement was therefore admissible as having been made "while the conspiracy continued". *Evans* v. *State,* 222 Ga. 392, 402, 150 S.E. 2d 240, 248. This Court denied certiorari, 385 U.S. 953.

Appellee thereafter filed a petition for a writ of habeas corpus in the federal district court, which denied it (App. 4–12; 21–25). The Court of Appeals for the Fifth Circuit reversed. *Evans* v. *Dutton,* 400 F. 2d 826. It held that, as applied to this case, the

[2] The applicable Georgia statute (Ga. Code Ann. § 38–306 (1954 Rev.)) provides:

"After the facts of conspiracy shall be proved the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all."

The State introduced extensive additional evidence against appellee (see appellant's Brief, pp. 5–6). Williams did not testify.

Georgia statute violated the right to confrontation secured by the Sixth and Fourteenth Amendments to the Constitution (App. 28–38). The court found that in light of the circumstances in which the statement attributed to Williams was made, it was "inconceivable" that it was uttered "during the pendency of the criminal project" (App. 37) or made in furtherance of the criminal enterprise. (App. 37, note 24.) Finding no rational substitute for the benefits of confrontation in these circumstances (App. 34), the court concluded that application of the Georgia statute had denied confrontation to appellee, and that the admissibility of the evidence could not be considered harmless error. (App. 30, n. 4.)[3]

ARGUMENT

INTRODUCTION AND SUMMARY

Having earlier restored this case for reargument this Term (397 U.S. 1060), the Court on June 29, 1970, invited the Solicitor General to express the views of the United States and to participate in the oral argument (399 U.S. 924). This Brief is submitted in response to that request.

Traditionally, the United States has not participated in the numerous cases in this Court involving the application of the Constitution of the United States

[3] Williams was convicted at a separate trial, at which the statement he allegedly made to Shaw was also introduced against him. His conviction was affirmed by the Georgia Supreme Court. *Williams* v. *State*, 222 Ga. 208, 149 S.E. 2d 499, certiorari denied, 385 U.S. 887. The Fifth Circuit thereafter reversed his conviction, challenged in habeas proceedings, on grounds not relevant to the issue posed here. *Williams* v. *Dutton*, 400 F. 2d 797 (C.A. 5).

to criminal trials in State courts. This has been because ordinarily the outcome of particular State cases is not of direct interest to the federal government and fundamental considerations of federalism militate against executive intrusion into the area of State criminal law. However, the tendency of this Court's decisions in recent years to impose upon the States constitutional restrictions mirroring those applicable in federal prosecutions may in some situations establish a new kind of federal interest in State cases in this Court, arising out of the fact that constitutional law applicable in federal cases may be made in cases coming to this Court from the States. It was such an interest that induced us to participate in *California* v. *Green*, No. 387, last Term (399 U.S. 149), and we assume that similar considerations led to the Court's request in the instant case.

This case involves the court of appeals' consideration, on habeas corpus, of the Georgia Supreme Court's application of a Georgia statute embodying a version of the traditional exception to the hearsay rule permitting one co-conspirator's declarations to be admitted against another. The court of appeals held that the Georgia court's application of the Georgia statute violated the defendant's "sixth and fourteenth amendment right to be confronted by the witnesses against him" (App. 29). The basis for the decision below thus raises a question of direct interest in federal prosecutions for conspiracy and joint-ventures—an interest in the consideration of the constitutional foundations of the co-conspirator doctrine

in general that this case is likely to involve, following as it does the *Green* decision.

Accordingly, we begin with a general discussion of the co-conspirator doctrine. We shall show in Point I that this longstanding doctrine is fundamentally sound under the Sixth Amendment. Its birth was roughly contemporaneous with the Bill of Rights and this Court has repeatedly recognized it. Notwithstanding the difficulty of articulating a rationale, we shall show that the co-conspirator exception, when properly applied, assures the requisites of reliability and evidentiary necessity that can serve, under the Sixth Amendment, as a rational substitute for strict confrontation in the courtroom. With that much established, we think that the facts of this case would be an inadequate vehicle for any attempt to formulate—if that is possible as an abstract matter—comprehensive Sixth Amendment rules for the application of the co-conspirator doctrine to the multifarious types of declarations that might be offered in evidence for different purposes in the complex factual circumstances of particular cases. While the factor of necessity (*i.e.*, the unavailability of an important declarant to testify) may not present serious problems in the normal conspiracy case, the determination of sufficient reliability is likely to be vexatious, as a few examples show. Close questions may arise as to whether a particular declaration is sufficiently related to the establishment, continuance or execution of a conspiracy to warrant its admission against a co-conspirator. It may be even more difficult to determine the interrelated question of the "trustworthiness" of

a particular declaration as tending to prove the proposition for which it is offered; ordinarily a declaration would be offered for what it implies about the nature, scope and activities of a conspiracy, but there are likely also to be cases where a statement of fact is offered to establish the truth of that fact. Neither the past decisions of this and other Courts nor the scholarly literature on this general subject offer ready assistance in the development of comprehensive principles of application, and the facts of this case provide very limited general illumination. Accordingly, we believe that the ramifications can be responsibly explored only as specific cases arise in the future.

In Point II we address ourselves to an equally significant question—the appropriate constitutional approach for determining the validity of State rules of evidence, such as the co-conspirator exception to the hearsay rule which is involved here. We start by noting that if this were a federal case we would conclude that the conviction should be overturned under applicable decisions in the exercise of the Court's supervisory power. Under governing federal law as it now stands, the extra-judicial utterance involved here could not be said to have a tendency to further the conspiracy, the object of which was achieved some fifteen months earlier. See, *e.g.*, *Fiswick* v. *United States,* 329 U.S. 211; *Grunewald* v. *United States,* 353 U.S. 391. But this is not a federal case and the admissibility issue must be resolved in terms of the Confrontation Clause of the Sixth Amendment as applied to the States under the Due Process Clause of the Fourteenth.

Viewing the question in its constitutional setting, it is our submission that the Confrontation Clause should not be read as imposing upon the States an unyielding requirement which would solidify the existing rules, or any particular rules, of hearsay evidence, requiring immutable adherence to them in all their scope and detail. Indeed, in *California* v. *Green*, *supra*, the Court was quite careful to make clear that the Confrontation Clause was not simply a "codification of the rules of hearsay and their exceptions as they existed historically at common law." (399 U.S. at 155). The need to avoid transforming hearsay rules into constitutional doctrine is particularly revealed by analysis of the co-conspirator exception. The rationale of the exception and the proper extent of its application are undergoing reexamination and may require change and adjustment with experience; this would be frustrated by freezing the doctrine—even if there were uniformity in application, which there is not—into a constitutional edict obligatory on the states. In this area of evidence, experimentation is essential to enhance the search for truth within the context of the adversary system, and such experimentation is facilitated if the states are given room for innovation and adjustment.

There is another compelling consideration here. The federal courts—already burdened by a heavy case load of habeas corpus applications seeking to challenge state convictions—should not be called upon

to review the minutiae of State rules of evidence in collateral proceedings. That is not to suggest that a State may constitutionally adopt any evidentiary rule it deems desirable; it is to suggest only that the hearsay rules with all their complexity and detail should not be treated as rules of federal constitutional law. Rather, the Confrontation Clause should be read as imposing on the States only certain basic principles which they are free to apply with some flexibility.

Insofar as the outcome in this case is concerned, it is apparent that the Georgia statute here involved can have numerous proper applications. On the other hand, there are clearly limitations beyond which it could not be applied without running afoul of constitutional prohibitions. There may well be, however, proper bases for finding sufficient reliability to constitute a legitimate substitute for literal confrontation in this case. The declaration had relevance to the case, it was apparently spontaneous, and it was against Williams' interest to make it. Since the State courts did not consider any such alternative grounds for admissibility we believe that they should be afforded that opportunity. We point out that even if this Court were to hold the declaration admissible, thus reversing the court of appeals, that court, on remand, would consider the other unrelated constitutional issues raised by appellee and would be likely to enter a judgment looking toward further state proceedings in this case.

I. THE CO-CONSPIRATOR HEARSAY EXCEPTION IS FUNDAMENTALLY VALID UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

A. THE PRINCIPLES OF THE DOCTRINE ARE CONSISTENT WITH THE CONFRONTATION CLAUSE

Although this Court's decision in *California* v. *Green*, 399 U.S. 149, dealt with a problem distinct from that here—holding that the availability of a declarant for cross-examination at trial made his prior inconsistent statement constitutionally admissible for substantive purposes—the Court's general discussion of the relationship between hearsay and confrontation sets the background for consideration of this case. In *Green*, the Court confirmed that the admission of hearsay—even hearsay that might be inadmissible as a matter of the law of evidence—"does not lead to the automatic conclusion that confrontation rights have been denied" (399 U.S. at 156); it cannot be said that the "Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law" (*id.* at 155). The Court noted, however, that any exception to "the literal right to 'confrontation' and cross-examination" requires "careful scrutiny" (399 U.S. at 162).

There is nothing in *Green* that undermines the continued existence of the rules admitting statements of absent declarants that can pass such "careful scrutiny." *Green* recognizes implicitly—as earlier Sixth Amendment decisions have recognized—that rational substitutes for literal confrontation may be found where the situation requires and proper protections

are provided.[4] We submit that, when applied within proper limits, the co-conspiritor doctrine embodies such a rational substitute. See *Delaney* v. *United States*, 263 U.S. 586, 590, rejecting the contention that the right of confrontation was denied by receipt at a federal trial of extrajudicial statements of a deceased co-conspirator apparently made in furtherance of the conspiracy.

1. History suggests the doctrine's compatibility with the Sixth Amendment confrontation guarantee. This exception to the hearsay rule was developed in a series of English treason trials held virtually contemporaneously with the passage of the Bill of Rights,[5] was soon adopted by a number of the States, and was approved in Mr. Justice Story's 1827 opinion for the Court in *United States* v. *Gooding*, 12 Wheat. 460, 469–470. There is no evidence to suggest that it was considered in any way incompatible with the right secured by the Confrontation Clause or that the Fram-

[4] *E.g.*, a dying declaration, *Mattox* v. *United States*, 146 U.S. 140, 151, or prior testimony where the declarant is unavailable, *Mattox* v. *United States*, 156 U.S. 237, 240–244; see *Barber* v. *Page*, 390 U.S. 719, 722–725; see discussion in our Brief in *Green*, No. 387, O.T., 1969, pp. 7–8, 14–15, 22–23.

[5] See Levie, *Hearsay and Conspiracy*, 52 Mich. L. Rev. 1159, 1162–1163 (1954); see also Note, *Developments in the Law—Criminal conspiracy*, 72 Harv. L. Rev. 920, 922–923 (1959).

The crime of conspiracy itself evolved in the late Thirteenth and early Fourteenth centuries in England and was confined to offenses against the administration of justice. In the Sixteenth and Seventeenth centuries the crime was expanded to approximately its present scope. See Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 394–402 (1922).

ers meant to undermine this common law doctrine.[6] Cf. Mr. Justice Harlan's concurring opinion in *California* v. *Green, supra,* 399 U.S. at 174–179.

This Court has frequently recognized the basic validity of this hearsay exception. See, *e.g., Brown* v. *United States,* 150 U.S. 93, 98; *Clune* v. *United States,* 159 U.S. 590, 593; *Delaney* v. *United States,* 263 U.S. 586, 590; *Fiswick* v. *United States,* 329 U.S. 211, 217; *Krulewitch* v. *United States,* 336 U.S. 440, 442–443; *Lutwak* v. *United States,* 344 U.S. 604, 617–618; *Wong Sun* v. *United States,* 371 U.S. 471, 490. While the Court has also indicated the inherent dangers of carrying the co-conspirator doctrine to the limits of its logic (*e.g., Grunewald* v. *United States,* 353 U.S. 391, 404; *Krulewitch, supra,* 336 U.S. at 443–444), it has not focused on the question whether these dangers are of constitutional proportions or more simply subjects for the exercise of its supervisory power over federal evidentiary rules. And even as a non-constitutional matter of evidence law, the scope of the doctrine has not been clearly delineated.

2. Like its boundaries, the constitutional and evidentiary rationales for the co-conspirator doctrine have not been fully and consistently clarified. To the extent that a rationale has been articulated, the exception has usually been justified by a concept of agency or partnership; this Court has used such terms, see,

[6] See this Court's discussion in *California* v. *Green,* 399 U.S. 149, 156–158. We have developed the framework from which the Confrontation Clause and the hearsay rules developed in our Brief in *Green,* pp. 8–15.

e.g., Lutwak v. *United States,* 344 U.S. 604, 617;[7] *Pinkerton* v. *United States,* 328 U.S. 640, 645–648. On one level this suggests an assumption of risk rationale—one who knowingly joins an illegal scheme takes the chance of being charged with statements made by his criminal partners during the course and in furtherance of the scheme. Cf. *Katz* v. *United States,* 389 U.S. 347. On another, and perhaps more significant level, this statement of the rule includes a concept of reliability—given the unitary goal, what one conspirator says in furtherance thereof tends to be a reliable reflection of what a co-conspirator against whom the statement is sought to be admitted would have also said in similar circumstances. Putting the matter in most simple terms: If two or more agree to rob a bank and one stays in the automobile while the other enters the bank and declares that "This is a stickup", it is not only rational to conclude that this statement was authorized by the non-declarant conspirator, or, at least, that he contemplated that it would be made; it is additionally logical to conclude that this statement mirrored what the conspirator assigned to the automobile would have said had it been his assignment to enter the bank. Implicit in such an "agency" or "partnership" justification is its inapplicability to any statement not made in planning

[7] As put in *Lutwak*, *supra* at 617: "Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party."

or carrying out the activities of the conspiracy, or to any statement made after the conspiracy ends. *E.g.*, *Fiswick* v. *United States, supra,* 329 U.S. at 217. There can be no reasonable assumption of risk as to a partner's actions outside the scope or term of the partnership, and similarly there is no rational basis for believing that the defendant would have done or said what the other did or said if it was not related to their joint activities.[8]

There is some present movement in federal criminal law to discard agency notions and furtherance concepts on the theory that these formulations do not adequately take into account confrontation considerations, which have only recently come to the fore in this context. In the course of its comments on the proposed Organized Crime Control Act of 1969 (S. 30, 91st Cong., 1st Sess.), the Department of Justice recommended that a provision be added codifying the co-conspirator exception with the following requisites: (1) the declaration was made by the co-conspirator during participation in the conspiracy; (2) there are in existence facts and circumstances from which the

[8] The combination of *res gestae* and agency notions relied upon by Mr. Justice Story in *United States* v. *Gooding*, 12 Wheat. 460, 469–470, similarly point to this concept of reliability.

Professor Wigmore's theory would similarly emphasize reliability and trustworthiness. See 4 Wigmore, *Evidence* (3d ed. 1940) §§ 1077, 1079, 1080. Professor Morgan has rationalized the matter as a vicarious admission. "If B authorizes A to speak for him, he can take no valid exception to the reception of A's statements against him which he could not take to the reception of his own." See Morgan, *Rationale of Vicarious Admissions*, 42 Harv. L. Rev. 461, 463, 464–465 (1929).

trustworthiness of the statement may be inferred; (3) the declaration relates to the existence or execution of the conspiracy; and (4) the declaration was made at a time when the defendant against whom the statement is used participated in the conspiracy. See S. Rept. No. 91-617, 91st Cong., 1st Sess., pp. 113–115. Although this proposal is not included in the bill as passed by the Senate and pending in the House of Representatives, its thrust is significant. The purpose of the proposed substitution of relationship to the conspiracy and trustworthiness for the more traditional furtherance concept was not to eliminate the restriction contemplated by the furtherance requirement but rather to refine it in light of the erratically over-liberal and over-restrictive aplications it has been given in some lower courts. *Ibid.*[9] Such emphasis on reliability,

[9] The same notions are embodied in a statute proposed by one of the consultants to the Commission on the National Commission on Reform of Federal Criminal Laws. (Volume 1 of the Working Papers of the National Commission, p. 386.) This provision, however, was not contained in the Study Draft.

On the other hand, the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates promulgated by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (1969), would retain the "furtherance" concept, but would reject the agency theory "as a basis for admissibility beyond that already established." See Rule 8–01(c)(3)(v); Comments in the Proposed Draft, p. 169. These proposed rules do not purport to deal with the matter in constitutional terms. See Comments *supra*, pp. 156–159, 169.

The consultant on conspiracy to the National Commission has observed (Vol. 1 of the Working Papers, p. 400, Note B):

"Admissibility may properly rest ultimately on principles analogous to those of agency, yet more ought to be required. Something should be explicitly said about trustworthiness.* * *

"It might well be that this formulation would not, in prac-

whether in a furtherance framework or not, provides, we submit, a rational substitute for strict confrontation that serves the underlying purpose of the Confrontation Clause—that a conviction be based upon the best evidence that the prosecution can produce and that the defense have the opportunity, through the adversary process, to assure that the jury does not rely upon untrustworthy evidence—without unduly hindering the search for truth.

3. There is a further justification for the co-conspirator doctrine that is highly pertinent to confrontation considerations. That is the element of prosecutorial necessity—the unavailability of an essential declarant for examination and cross-examination at trial—an element that has figured importantly in the application of the Confrontation Clause. As we have pointed out, one of the purposes of the Clause is to require the government to produce any available witness, and to discourage it from unnecessary resort to the short-cut of prior testimony or statements. *Barber* v. *Page,* 390 U.S. 719, 725–726; *Motes* v. *United States,* 178 U.S. 458. The converse has also been recognized: the unavailablity of a witness may justify the use of out-of-court statements by him that could not otherwise be used. *California* v. *Green, supra,* 399 U.S. at 165–168, and concurring opinion of Mr. Jus-

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Footnote continued from p. 15.

tice, either expand or contract the present rule. But what it would do is make the search for the just answer surer, since it would explicitly articulate the end to be sought. One who joined a conspiracy would then run the risk of liability for only the circumstantially trustworthy statements of his fellow conspirators, a not unreasonable risk."

tice Harlan at 182–183; *Mattox* v. *United States*, 156 U.S. 237.

Unavailability of the declarant assumes particular significance in the present context when the familiar justification for making conspiracy a crime is taken into account. The generally accepted proposition is that group action toward an antisocial end is inherently more dangerous to society than individual movement toward that same end. Correspondingly, group concert is much more difficult to prove by direct evidence. "Secrecy and concealment are essential features of successful conspiracy." *Blumenthal* v. *United States*, 332 U.S. 539, 557. Accordingly, the law permits conviction of those who know the essentials of the scheme but not all of its details. "Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity." *Ibid.* "[T]he choice may not be between more reliable and less reliable types of evidence, but between admitting inferior evidence or no evidence at all"; [10] or again, as another recent commentator has put it, the true reason for the exception is the "great probative need for such testimony". [11]

Of course, the *ad hoc* "need" of the prosecutor for a conviction cannot justify the use of untrustworthy evidence to secure it. But, given the proposition that

[10] See Note, *Developments-Conspiracy*, *supra*, 72 Harv. L. Rev. at 989.

[11] Levie, *Hearsay and Conspiracy*, *supra*, 52 Mich. L. Rev. at 1166.

the Confrontation Clause does permit unavailability to be taken into account where the government cannot be blamed for it, and given the legitimate need for declarations of co-conspirators in proving crimes involving joint-ventures, a reasonably limited exception to literal confrontation is essential.

B. THE PROBLEMS OF APPLYING THE DOCTRINE, CONSISTENTLY WITH THE CONFRONTATION CLAUSE, TO PARTICULAR FACT SITUATIONS

Although, for the reasons we have given, we believe that the co-conspirator doctrine is consistent with the Sixth Amendment, that is not to say that every out-of-court statement by a defendant's co-conspirator is admissible at his trial for all purposes. It is apparent that the proper application of the doctrine presents problems more difficult than its basic articulation and justification. Neither past judicial decisions nor the scholarly literature, as we have noted, offer a comprehensive framework for developing clear rules of application at this point. Accordingly, we think that refinements must be considered in the light of particular fact situations.

Ordinarily, it should not be a matter of great difficulty to determine whether or not there is a *necessity* for resort to a co-conspirator's statement in a particular trial; we expect, as we have indicated, that most conspiracy cases would present such a necessity, and the prosecution should be required to show no more than that, through no fault of its own, an im-

portant declarant is not available to testify.[12] The more troublesome element in particular cases will be that of reliability, which—as we have suggested (pp. 13, 15–16, *supra*)—itself involves two basic inquiries: whether the declaration is sufficiently related to the conspiracy and whether it is sufficiently "trustworthy" in the context in which it is offered. We have already given the example of a bank-robbery conspiracy where one of the co-conspirators enters a bank and says "This is a stickup". That example presents no serious problem, since the statement was clearly an element in the actual execution of the conspiracy and its utterance was a trustworthy indication that the conspiracy (assuming its existence has been otherwise established) was attempting a robbery. Other situations, however, present more difficult analytical problems.

Whether or not a particular declaration sufficiently relates to the establishment, continuance or execution of a conspiracy depends essentially on the factual context which necessarily varies in each case. If the co-conspirators say in unison "We hereby establish a conspiracy to rob the following banks" there would, of course, be no problem, and indeed the statement may no more be hearsay than the utterance of words of agreement would be in a contract suit. Nor would there be a serious question if one co-conspirator gave another instructions for the robbing of a bank or inquired of a third party where he could obtain tools

[12] If the declarant is on the stand, and willingly testifies to the relevant events (see *Douglas* v. *Alabama*, 380 U.S. 415), the prosecution may constitutionally utilize a prior statement. *California* v. *Green*, *supra*, 399 U.S. at 168.

to carry out the purpose of the conspiracy or sought to recruit a third party to join the scheme.[13] But what of a report by one co-conspirator to another about a robbery just completed, or an argument or boasting among co-conspirators. The possible variants are legion. Equally difficult problems may arise in considering when a statement to a third party, for example a victim or a co-conspirator's wife, may be regarded as reasonably within the scope of a conspiracy.

Even more difficult would be any attempt to lay down comprehensive rules for determining whether a particular declaration is "trustworthy" in a particular context. By "trustworthy" we do not necessarily mean "truthful", because ordinarily a co-conspirator's declaration would not be offered for the direct truth of the underlying factual assertion made in it. More commonly, such a declaration would be used because of what it implies: *i.e.*, the conspirators would not be talking among themselves unless they were actually involved together in the matter under discussion. Such implications would ordinarily be more reliable in a conspiracy situation than would reliance upon a specific statement of fact; moreover, it would in general be unrealistic to say that a person entering a conspiracy thereby vouches for the truth of all factual statements that his co-conspirators may make about their joint activities. On the other hand, it might be shown in appropriate circumstances that a report by one member to another about something he in-

[13] See, *e.g.*, *Baker* v. *California*, pending on petition for a writ of certiorari, No. 5123, this Term, and the opinion of Supreme Court of California appended to the petition.

dividually has done in furtherance of the conspiracy is sufficiently likely to be accurate (because accuracy serves the common enterprise) to permit its admission for the truth of the facts reported. Again, the variables may be extremely complex; whether a particular declaration is trustworthy proof of a particular fact can be determined only in detailed context.

In short, while this case may well provide a starting point for analysis as to the scope and application of the co-conspirator exception, it should not be the vehicle for the announcement of any final principles. In this area of evidentiary law, as in most others, sound doctrine can come only, in Mr. Justice Miller's phrase, "by the gradual process of judicial inclusion and exclusion." *Davidson* v. *New Orleans,* 96 U.S. 97, 104.

II. APPLICATION OF THE SIXTH AMENDMENT CONFRONTATION REQUIREMENT IN STATE CRIMINAL TRIALS

Because this is a case coming here from a State court, it poses more directly than would a federal case the issue of the strictly constitutional limits upon the use of a co-conspirators' statements. We have no doubt that Williams' statement would have been inadmissible under the presently established federal rules of evidence had he been tried in a federal court. The declaration was made fifteen months after the police officer was killed, and there is apparently no basis for saying that the basic conspiracy was still in effect. In *Krulewitch* v. *United States,* 336 U.S. 440, *Lutwak* v. *United States,* 344 U.S. 604, 616, and *Grunewald* v. *United States,* 353 U.S. 391, 399–402, this

Court rejected, as a matter of federal law, the government's argument that a continuing subsidiary agreement to conceal a crime, its perpetrators, and its fruits, may be implied from a conspiracy to commit the crime. And this Court rejected a declaration made under circumstances similar to those here in *Fiswick* v. *United States,* 329 U.S. 211, 217, observing that a "confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it." But the cases establishing the specific law that would govern this case in a federal court are not explicitly constitutional decisions, and may well involve to a substantial extent the exercise of this Court's federal supervisory powers which do not, of course, govern the States. Thus, determination of the *constitutional* limits on the States in these circumstances is a more difficult task.

A. GENERAL PRINCIPLES

We start, of course, with the general proposition that the Fourteenth Amendment provides a constitutional right to confrontation in state criminal proceedings. *E.g., Pointer* v. *Texas,* 380 U.S. 400. Last Term's majority opinion in *California* v. *Green, supra,* similarly approached that State case as involving a determination of the scope of "the defendant's right of confrontation guaranteed by the Sixth Amendment and made applicable to the States by the Fourteenth Amendment" (399 U.S. at 150–151). *Green* went on, however, to suggest that the Confrontation Clause leaves the States a good deal of leeway. The

decision there was that confrontation considerations do not constitutionally bar a State's decision to relax the traditional hearsay rules so as to permit substantive use of a witness' out-of-court statement. A major premise of the decision was that the Constitution should not be read as imposing upon the States an ironclad doctrine which would freeze the existing rules, or any particular rules, of hearsay evidence and require undeviating allegiance to them in all their sweep and detail. The Court, indeed, was quite careful to indicate the contrary: "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." (399 U.S. at 155).

The same theme was emphasized in the concurring observation of the Chief Justice that "neither the Constitution as originally drafted, nor any amendments, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States" (*id.* at 171–172). Again, Mr. Justice Harlan in his concurring opinion stressed the changing fortunes of the evidentiary rules of hearsay and the undesirability of limiting "the flexibility of the States and chok[ing] experimentation in this evolving area of the law" (*id.* at 184–185). The thrust of these views, as we understand it, is that there must be some play in the joints when dealing

with matters of such variety and complexity as state rules of evidence.

There are two fundamental considerations that warrant some explanation here as reasons why the States should be as free as the protection of fundamental rights permits from constitutional limitations upon the rules of evidence—and especially hearsay evidence—to be applied in their courts. Both may properly be called principles of a vital federalism. The sound development of the law in this difficult area benefits from relatively unfettered experimentation in the "laboratories" of the States. And the policing burdens that constitutionalization of rules of evidence would give the federal courts might well jeopardize sound judicial administration.

1. The rules of hearsay are constantly in the process of reform and refinement. Bentham [14] was one among many who believed that, in their varying applications, hearsay prohibitions tend to keep relevant evidence from the jury. "Hearsay is competent evidence by the law of many enlightened countries." *Great Northern Railway Co.* v. *Washington*, 300 U.S. 154, 168, 173 (Cardozo, J., dissenting). Judges have long pondered—and differed—as to the appropriateness of these rules of exclusion.[15] See the concurring

[14] See, *e.g.*, Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 Harv. L. Rev. 932 (1962); see also, Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331, particularly at 344–346 (1961).

[15] As Professor Wigmore has stated in this regard:

"The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infrajudicially,—this depends on the law of Evidence for the time

opinion of Mr. Justice Harlan, in *Green, supra,* 399 U.S. at 184–185, n. 18. As one recent commentator has observed, "[i]n this area, rules of law must be rules of thumb. All we can ask is that the categories of admissible hearsay be generally reliable; any particular example may be suspect and call for the exercise by a trial judge of his discretion to exclude unreliable evidence." [16]

The stultifying effect of any attempt to weave elaborate evidentiary rules and exceptions into the fabric of the Sixth Amendment is particularly illustrated in the present context of the co-conspirator exception. To begin with, there are wide differences in state practice. The American Law Institute's formulation would abolish the requirement of furtherance; it would instead focus on relevancy and the fact that the statement sought to be admitted was made during the existence of the plan.[17] A somewhat different formulation, but one also focusing upon relevance, is

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being,—but only what mode of procedure shall be followed—*i.e.*, a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially." 5 Wigmore, *Evidence*, § 1397, p. 131 (3d ed. 1940).

[16] Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1435, 1437 (1966).

[17] See Rule 508(b), A.L.I. *Model Code of Evidence*, p. 249 (1942), which provides that evidence of a hearsay declaration is deemed admissible if the judge determines that "the party and the declarant were participants in a plan to commit a crime or civil wrong and the hearsay declaration was relevant to the plan or its subject-matter and was made while the plan was in existence and before its execution was complete * * *." The comments to this provision suggest that all declarations made during the pendency of a conspiracy are "likely to be true, and are usually made with a realization that they are against the declarant's interest" (*Comment*, p. 251). Also statements of a

contained in the *Uniform Rules of Evidence*, Rule 63(9)(b)(1953) contained in 9A Uniform Laws Ann. (1965), p. 636. While neither of these proposals has met with wide acceptance in the state jurisdictions,[14] recommendations for changes are being presented on a variety of fronts. See *e.g.*, S. Rep. No. 91-617, 91st Cong., 1st Sess. pp. 113–115, discussed *supra* pp. 14–15; see also, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates (1969) 153–156.

In these circumstances, it would do disservice to the purposes of a vital federalism to solidify any detailed rules in this area into constitutional doctrine obligatory upon the states, and thereby frustrate innovative efforts "to enhance the search for truth in the criminal trial," *Williams* v. *Florida*, 399 U.S. 78, 82; that truth, after all, is the ultimate goal of experimentation and change in criminal rules of evidence. See *People* v. *Spriggs*, 36 Cal. Rptr. 841, 845, 389 P. 2d 377, 381 (Traynor, J.).[15] The court in *Williams* rejected, with similar justifica-

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Footnote continued from p. 25.

co-conspirator after his arrest would be admissible if the execution of the plan had not yet terminated. See *Illustration* 2, p. 254.

[14] See, Note, *Preserving The Right To Confrontation—A New Approach To Hearsay Evidence in Criminal Trials*, 113 U. of Pa. L. Rev. 741, 742 n. 9 (1965); *Note B, Procedural Problems in Conspiracy*, contained in Working Papers of the National Commission on Reform of Federal Criminal Laws, p. 400 (1970); see also, *Handbook of the National Conference of Commissioners on Uniform State Laws* (1969), table opposite p. 192.

[15] It is not inappropriate in this context to recall the words of Mr. Justice Brandeis that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; * * *." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 280, 311 (dissenting opinion).

tion, any notion that a requirement that a jury have twelve members "has been immutably codified into our Constitution" (399 U.S. at 90); in the absence of any substantial historic foundation for such a rule the Court deemed the relevant inquiry to be "the function that the particular feature performs" and concluded that it was not "an indispensable component of the Sixth Amendment." 399 U.S. at 99–100. Similarly, we suggest, the Confrontation Clause should not be read as making the traditional rules of evidence "indispensable component[s]". To elevate a "rule" to a constitutional mandate is to assume, at the least, the existence of a manageable body of readily identifiable "law" which the "rule" represents. This is at best a fiction in this area. We suggest that Mr. Justice Holmes' warning in *Guy* v. *Donald*, 203 U.S. 399, 406, is applicable here: "As long as the matter to be considered is debated in artificial terms there is danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds of which the name was applied."

2. Another consideration must be taken into account. It is well known that habeas corpus litigation has increased enormously over the past several years.[29] Undeniably, volume of litigation alone should not be the decisive determinant of whether habeas corpus relief should be granted or not. Federal courts on

[29] In 1968, over 6300 petitions for habeas corpus were filed in the federal courts by state prisoners, an increase of 286 percent in five years. See Annual Report, Director of the Administrative Office of the United States Courts, 130 (1968); see also Note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1041 (1970).

occasion must take an independent look at the validity of state resolution of serious constitutional claims. *E.g.*, *Fay* v. *Noia*, 372 U.S. 391; *Townsend* v. *Sain*, 372 U.S. 293. At the same time, however, difficult problems in administration have arisen by virtue of the sheer bulk of such litigation. To insure that the writ provides "a prompt and efficacious remedy for whatever society deems to be intolerable restraints" (*Fay* v. *Noia*, *supra*, 372 U.S. at 401–402;[21] *Harris* v. *Nelson*, 394 U.S. 286, 291), it should not be permitted "to founder in a 'procedural morass.'" *Harris* v. *Nelson*, *supra*, 394 U.S. at 291–292, quoting from *Price* v. *Johnston*, 334 U.S. 266, 269. But such a morass may well result if every litigant who is dissatisfied with state resolution of evidentiary matters may automatically term the alleged violation a "Sixth Amendment Confrontation issue" and obtain collateral relief in the federal courts.[22] Thus both policy and unavoidable practical considerations counsel restraint in federalizing the rules of evidence.

B. SUGGESTED LINES OF ANALYSIS

The foregoing discussion has sought to pinpoint the dangers we perceive in the adoption of any doctrine which woodenly requires a uniform code of hearsay

[21] "[*H*]*abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank* v. *Mangum*, 237 U.S. 309, 346 (Holmes J. dissenting).

[22] Professor Wigmore devotes over 800 pages of his treatise explaining and discussing exceptions to the hearsay rule. See 5 & 6 Wigmore, *Evidence* (3d ed. 1940).

evidence to be applicable without variation in every State because the Confrontation Clause applies to the States. The thrust of our argument is to suggest that to follow that line of analysis may well undermine sound concepts of federalism and the proper administration of criminal justice in the States. This, of course, is not to say that a state may operate on a clean slate and adopt any rules of evidence it sees fit. Undeniably, there are and must be constitutional limits dictated by the core purpose of the Confrontation Clause to afford an accused a fair trial. We now consider how the Confrontation Clause may be applied so as to preserve these important values.

There are variant ways of articulating the principles by which reasonable State flexibility can be assured consistent with defendants' fundamental federal constitutional rights as this Court has developed them in recent years. One approach—and we commend it to the Court—is to emphasize the role of the supervisory power in formulating evidentiary principles for the federal courts, reserving the Confrontation Clause as a statement of fundamental principles which both the State courts and federal courts (the latter under this Court's special supervision) may apply in ways which meet its basic purpose. Compare *Ker* v. *California*, 374 U.S. 23, 31–33. Especially in light of its sparse language,[*] the Clause need not and should not be read as the foundation for an unyielding code of evidence. It should rather be re-

[*] The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."

garded as a limited statement of basic constitutional principle that is susceptible of flexible application in particular cases. Nothing in history (see *Green, supra*, 399 U.S. at 156–157) indicates that the "hearsay-evidence rule, with all its subtleties, anomalies and ramifications [should] be read into the Fourteenth Amendment", *Stein* v. *New York*, 346 U.S. 156, 196, or, for that matter, into the Sixth. On the contrary, the subtleties of these rules point in an opposite direction—to fluidity and elasticity of application. "The exceptions are not * * * static, but may be enlarged from time to time if there is no material departure from the reason of the general rule" *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (Cardozo J.). Nor is there any particular function that the present formulation of conspiracy rules of admissibility performs which inexorably requires that it be made an "indispensable component" of the Sixth Amendment made applicable to the states through the Due Process Clause of the Fourteenth. Compare *Williams* v. *Florida, supra*, 399 U.S. at 99–100.

A somewhat different approach has been suggested in Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 Yale L.J. 74 (1963). Professor Henkin suggests that the concept of "ordered liberty" be emphasized, not to deny the applicability of the procedural protections of the Bill of Rights to state prosecutions but rather as a reminder that this can be done "without necessarily saddling all the states with what may be peripheral survivals or accretions in the Bill of Rights." *Id.* at 83; see also *id.* at 86–87. Thus, while giving reasonably concrete content to the Due

Process Clause of the Fourteenth Amendment—something that is desirable, *inter alia,* to avoid the excessive federalization of state criminal law that might arise from overzealous use of an amorphous "fairness" concept under the due process rubric—the origin of the constitutional limitations upon the States are emphasized as a reminder that it is not necessary to make those limitations identical in all respects with the limitations expressly stated in the Bill of Rights. In other words, applying the Sixth Amendment to the States need not bind them to all of the detailed subsidiary principles of "confrontation" in the general sense that may develop—or have survived—in the federal cases. Mr. Justice Fortas acutely observed in a related context, that the Fourteenth Amendment did not require the Court "slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings. * * * Our Constitution sets up a federal union, not a monolith." *Bloom* v. *Illinois,* 391 U.S. 194, 213–214 (concurring opinion).

Whatever the line of analysis, State courts should be given considerably greater flexibility than the lower federal courts in determining whether or not, in a particular situation, the elements of reliability and necessity that are rational substitutes for strict confrontation are present in sufficient degree. It is one thing to establish that the Constitution requires these factors to be present, but quite another to attempt to establish precise federal measures by which they must

be weighed. The Fourteenth Amendment, applying the Confrontation Clause of the Sixth to the States, requires the states to be cautious [24] in developing substitutes for actual confrontation. This does not mean, however, that this Court—or a lower federal court—should police state practice in the adoption of rules of hearsay evidence. The policies which we have already discussed militate against any excessive federal intrusion.

C. RESOLUTION OF THE ADMISSIBILITY QUESTION IN THIS STATE CASE

As *Amicus* our principal interest has been to state our general views with regard to the nature and application of the co-conspirator exception and the constitutional approach we believe to be appropriate in this State case. Under these views, it is evident that the generally phrased Georgia statute involved (see *supra*, n. 2) can have numerous constitutional applications; it is also undeniable that it would be susceptible of application in circumstances where the Confrontation Clause of the Constitution would not be satisfied. We will now suggest some of the considerations—consistent with our foregoing discussion—that are appropriate to a constitutional evaluation of the precise issue presented.

In justifying the admission of Williams' statement, some 15 months after the crime, implicating

[24] For example, we would have grave difficulty with a statute or judicially created rule of evidence which sought to authorize the admission into evidence in the trial of one conspirator of a confession made *to the police* by another after the conspiracy had terminated. See *e.g.*, *Bruton* v. *United States*, 391 U.S. 123.

Evans, the Supreme Court of Georgia stated (1) that "the conspiracy continued" since the conspirators "were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt", 222 Ga. at 402, 150 S.E. 2d at 248, and that (2) Williams' declaration was accordingly admissible as a co-conspirator's statement made "during the pendency of the criminal project," *ibid.* We do not believe that the Constitution precludes the initial proposition, which is asserted in a substantial body of state law (see *Krulewitch* v. *United States*, 336 U.S. 440, 444), that a subconspiracy to conceal the main conspiracy may be implied and continue after the main conspiracy's functions have been carried out. Although the federal law of evidence is otherwise, see pp. 21–22, *supra*, we believe there is no such constitutional doctrine obligatory on the states, and we perceive no basis for so limiting State development of this aspect of the substantive law of conspiracy. But accepting the State's determination that the conspiracy continued does not end the inquiry. There is a further question, not discussed by the Georgia Supreme Court, of the relationship the par-

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This view rests upon the proposition that such a procedure undercuts the very essence of confrontation protected by the Sixth Amendment. It is illuminating in this regard to note that, in holding *Bruton* retroactive, this Court characterized the *Bruton* defect as going "to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination of his guilt or innocence." *Roberts* v. *Russell*, 392 U.S. 293, 294, quoting from *Linkletter* v. *Walker*, 381 U.S. 618, 639 note 20.

ticular declaration bore to the conspiracy even if it continued. Although we would not foreclose a State effort to explain the relationship, we find ourselves unable to see how there was one. As this Court held in *Fiswick* v. *United States,* 329 U.S. 211, 217, a "confession or admission by one co-conspirator after he had been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it." Here too, the statement tended to frustrate rather than to serve the purposes of any conspiracy to conceal. In these circumstances, we doubt that the State courts could point to any element of reliability *arising out of the conspiracy* sufficient to constitute a rational substitute for the lack of confrontation.

It might be, however, that the State courts—given the latitude that we believe the Confrontation Clause should allow in such evidentiary matters—could articulate a sufficient basis for considering Williams' statement reliable on grounds other than the co-conspirator doctrine. Few would dispute that the declaration had relevance in the criminal case. The remark was apparently spontaneous and against Williams' own interest.[25] Since the State courts did not

[25] An analogy may be drawn to the "penal interest" exception which is usually bottomed upon the proposition that where one exculpates another by admitting his own guilt, there is sufficient trustworthiness for allowing that statement in for its exculpatory impact. See *e.g.*, 5 Wigmore, *Evidence* (3d ed. 1940) §§ 1476–1477. While this Court long ago held that the "penal interest" doctrine was not a proper exception to the federal hearsay rule, *Donnelly* v. *United States*, 228 U.S. 243, 272–277 (Holmes, J., dissenting), that case was not decided

consider such alternative grounds for admission, we think they should be given an opportunity to do so.[26] In this regard, we note that even if this Court were to hold the declaration admissible, thus reversing the court of appeals' judgment, the court of appeals on remand would presumably consider the substantial unrelated contentions raised by Evans in his habeas corpus petition (see 400 F.2d at 827 n. 3) and would likely enter a judgment looking toward further state proceedings in the case.[27]

CONCLUSION

For the foregoing reasons, we believe that the court of appeals was correct in its conclusion that the co-conspirator doctrine was insufficient constitutional justification for the admission of the utterance in question. However, we believe that the Georgia courts

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upon constitutional grounds. Moreover, the *Donnelly* ruling has been the subject of much criticism. See *e.g.*, Jefferson, *Declarations Against Interest; An Exception to The Hearsay Rule*, 58 Harv. L.Rev. 1, 39–43 (1944): see also *People* v. *Spriggs*, 36 Cal. Rptr. 841, 842–846, 389 P. 2d 377, 378–382 (Traynor, J.).

[26] We express no views on the "harmless error" argument in this case, which, we note, was rejected by the court below (App. 30, n. 4), since it involves no unsettled legal proposition (see *e.g.*, *Chapman* v. *California*, 386 U.S. 18; *Harrington* v. *California*, 395 U.S. 250) but merely the application of established rules to a particular set of facts.

[27] In the companion case involving Williams' separate trial, the court of appeals held, *inter alia*, that the State court should reassess the death penalty in accordance with *Witherspoon* v. *Illinois*, 391 U.S. 510. See 400 F. 2d 797, 800, 805. In the present case, the court of appeals did not reach Evans' *Witherspoon* and other constitutional arguments because it disposed of the case on the confrontation ground. It should be pointed out that counsel for the state conceded the applicability of *Witherspoon* at the previous oral argument of this case.

should be given the opportunity to consider alternative grounds for admission, and to that end urges reversal of the judgment below.

Respectfully submitted.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DUTTON, WARDEN *v.* EVANS

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10. Argued October 15, 1969—Reargued October 15, 1970—Decided December 15, 1970

Appellee was convicted of first-degree murder following a trial in which one Shaw testified, over objection, concerning a statement Williams (an alleged accomplice) had made in the prison where both were incarcerated, after Williams' return there from his arraignment, that had it not been for appellee "we wouldn't be in this now." There were 19 other prosecution witnesses, one of whom (another alleged accomplice) gave detailed eyewitness testimony of the crime and the participation of the appellee and Williams therein. Shaw's testimony was admitted under a Georgia statute which, as construed by the Georgia Supreme Court, allows into evidence a coconspirator's out-of-court statement made during the concealment phase of the conspiracy. Following affirmance of the conviction by the Georgia Supreme Court, appellee brought this habeas corpus proceeding in federal court. The District Court denied the writ but the Court of Appeals reversed, holding that the Georgia statute violated appellee's right to confrontation secured by the Sixth and Fourteenth Amendments. Appellee contends that the Georgia hearsay exception is unconstitutional since it differs from the hearsay exception applicable to conspiracy trials in the federal courts, which applies only if the out-of-court statement of a coconspirator was made in the course of and in furtherance of the conspiracy. *Held:* The judgment is reversed. Pp. 5—.

400 F. 2d 826, reversed.

MR. JUSTICE STEWART, joined by THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN, concluded that:

1. The coconspirator hearsay exception applied by Georgia is not invalid under the Confrontation Clause of the Sixth Amend-

Syllabus

ment, as applied to the States by the Fourteenth, merely because it does not coincide with the narrower exception applicable in federal conspiracy trials which results, not from the Sixth Amendment, but from the exercise of this Court's rule-making power respecting the federal law of evidence. Pp. 5–8.

2. In the circumstances of this case the admission into evidence of Williams' statement did not result in any denial of appellee's confrontation right since the out-of-court statement bore indicia of reliability that fully warranted its being placed before the jury. Pp. 9–15.

MR. JUSTICE HARLAN concluded that exceptions to the rule against hearsay must be evaluated, not by the Confrontation Clause (which is not designed to cope with the many factors involved in passing on evidentiary rules), but by the due process standards of the Fifth and Fourteenth Amendments. Thus evaluated, the Georgia statute is constitutional as applied in this case since the out-of-court declaration against interest involved here evinces some likelihood of trustworthiness and its exclusion from evidence is therefore not essential to a fair trial. Pp. 1–7.

STEWART, J., delivered the prevailing opinion, in which BURGER, C. J., and WHITE and BLACKMUN, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., joined. HARLAN, J., filed an opinion concurring in the result. MARSHALL, J., filed a dissenting opinion, in which BLACK, DOUGLAS, and BRENNAN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1970

A. L. Dutton, Warden, Appellant, *v.* Alex S. Evans. | On Appeal From the United States Court of Appeals for the Fifth Circuit.

[December 15, 1970]

Mr. Justice Stewart announced the judgment of the Court and an opinion in which The Chief Justice, Mr. Justice White, and Mr. Justice Blackmun join.

Early on an April morning in 1964, three police officers were brutally murdered in Gwinnett County, Georgia. Their bodies were found a few hours later, handcuffed together in a pine thicket, each with multiple gunshot wounds in the back of the head. After many months of investigation, Georgia authorities charged the appellee Evans and two other men, Wade Truett and Venson Williams, with the officers' murder. Evans and Williams were indicted by a grand jury; Truett was granted immunity from prosecution in return for his testimony.

Evans pleaded not guilty and exercised his right under Georgia law to be tried separately. After a jury trial, he was convicted of murder and sentenced to death.[1] The judgment of conviction was affirmed by the Supreme Court of Georgia,[2] and this Court denied certiorari.[3] Evans then brought the present habeas corpus proceeding in a federal district court, alleging, among other things, that he had been denied the constitutional right of confrontation at his trial. The District Court denied

[1] The parties agree that this death sentence cannot be carried out. See n. 20, *infra*.

[2] *Evans* v. *State*, 222 Ga. 392, 150 S. E. 2d 240.

[3] *Evans* v. *Georgia*, 385 U. S. 953.

the writ,[4] but the Court of Appeals for the Fifth Circuit reversed, holding that Georgia had, indeed, denied Evans the right, guaranteed by the Sixth and Fourteenth Amendments, "to be confronted by the witnesses against him." [5] From that judgment an appeal was brought to this Court, and we noted probable jurisdiction.[6] The case was originally argued last Term, but was set for reargument. 397 U. S. 1060.

In order to understand the context of the constitutional question before us, a brief review of the proceedings at Evans' trial is necessary. The principal prosecution witness at the trial was Truett, the accomplice who had been granted immunity. Truett described at length and in detail the circumstances surrounding the murder of the police officers. He testified that he, along with Evans and Williams, had been engaged in switching the license plates on a stolen car parked on a back road in Gwinnett County when they were accosted by the three police officers. As the youngest of the officers leaned in front of Evans to inspect the ignition switch on the car, Evans grabbed the officer's gun from its holster. Evans and Williams then disarmed the other officers at gunpoint, and handcuffed the three of them together. They then took the officers into the woods and killed them by firing several bullets into their bodies at extremely close range. In addition to Truett, 19 other witnesses testified for the prosecution.[7] Defense counsel was given full opportunity to cross-

[4] The opinion of the District Court is unreported.

[5] *Evans* v. *Dutton*, 400 F. 2d 826.

[6] 393 U. S. 1076. Since, as will appear, the Court of Appeals held that a Georgia statute relied upon by the State at the trial was unconstitutional as applied, there can be no doubt of the right of appeal to this Court. 28 U. S. C. § 1254 (2).

[7] Three of these were rebuttal witnesses. There were four defense witnesses, and Evans himself made a lengthy unsworn statement.

examine each witness, and he exercised that opportunity with respect to most of them.

One of the 20 prosecution witnesses was a man named Shaw. He testified that he and Williams had been fellow prisoners in the federal penitentiary in Atlanta, Georgia, at the time Williams was brought to Gwinnett County to be arraigned on the charges of murdering the police officers. Shaw said that when Williams was returned to the penitentiary from the arraignment, he had asked Williams "how did you make out in Court," and that Williams had responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Defense counsel objected to the introduction of this testimony upon the ground that it was hearsay and thus violative of Evans' right of confrontation. After the objection was overruled, counsel cross-examined Shaw at length.

The testimony of Shaw relating what he said Williams had told him was admitted by the Georgia trial court, and its admission upheld by the Georgia Supreme Court, upon the basis of a Georgia statute that provides: "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." [3] As the appellate court put it:

> "'The rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other.' The defendant, and his co-conspirator, Williams, at the time this statement was made, were still concealing their identity, keeping secret the fact that they had

[3] Ga. Code Ann. § 38-306 (1954 rev.).

killed the deceased, if they had, and denying their guilt. There was evidence sufficient to establish a prima facie case of conspiracy to steal the automobile and the killing of the deceased by the conspirators while carrying out the conspiracy, and the statement by Williams made after the actual commission of the crime, but while the conspiracy continued was admissible." (Citations omitted.) [9]

This holding was in accord with a consistent line of Georgia decisions construing the state statute. See, *e. g.*, *Chatterton* v. *State*, 221 Ga. 424, 144 S. E. 2d 726, cert. denied, 384 U. S. 1015; *Burns* v. *State*, 191 Ga. 60, 73, 11 S. E. 2d 350, 358.

It was the admission of this testimony of the witness Shaw that formed the basis for the appellee's claim in the present habeas corpus proceeding that he had been denied the constitutional right of confrontation in the Georgia trial court. In upholding that claim, the Court of Appeals for the Fifth Circuit regarded its duty to be "not only to interpret the framers' original concept in light of historical developments, but also to translate into due-process terms the constitutional boundaries of the hearsay rule." (Footnotes omitted.) [10] The court upheld the appellee's constitutional claim because it could find no "salient and cogent reasons" for the exception to the hearsay rule Georgia applied in the present case, an exception that the court pointed out was broader than that applicable to conspiracy trials in the federal courts.[11]

The question before us, then, is whether in the circumstances of this case the Court of Appeals was correct in holding that Evans' murder conviction must be set aside because of the admission of Shaw's testimony. In

[9] *Evans* v. *State*, 222 Ga. 392–400, 150 S. E. 2d 240, 248.

[10] 400 F. 2d, at 829.

[11] 400 F. 2d, at 830, 831.

considering this question, we start by recognizing that this Court has squarely held that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right . . . made obligatory on the States by the Fourteenth Amendment." *Pointer* v. *Texas*, 380 U. S. 400, 403. See also *Douglas* v. *Alabama*, 380 U. S. 415; *Brookhart* v. *Janis*, 384 U. S. 1; *Barber* v. *Page*, 390 U. S. 719; *Roberts* v. *Russell*, 392 U. S. 293; *Illinois* v. *Allen*, 397 U. S. 337; *California* v. *Green*, 399 U. S. 149. But that is no more than the beginning of our inquiry.

I

It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced. In the *Pointer* case itself, we referred to the decisions of this Court that have approved the admission of hearsay:

> "This Court has recognized the admissibility against an accused of dying declarations, *Mattox* v. *United States*, 146 U. S. 140, 151, and of testimony of a deceased witness who has testified at a former trial, *Mattox* v. *United States*, 156 U. S. 237, 240–244. See also *Dowdell* v. *United States*, *supra*, 221 U. S., at 330; *Kirby* v. *United States*, *supra*, 174 U. S., at 61. . . . There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses." [12]

The argument seems to be, rather, that in any given case the Constitution requires a reappraisal of every exception to the hearsay rule, no matter how long established, in order to determine whether, in the words of the Court of Appeals, it is supported by "salient and

[12] *Pointer* v. *Texas*, 380 U. S., at 407. See also *Salinger* v. *United States*, 272 U. S. 542, 548.

cogent reasons." The logic of that position would seem to require a constitutional reassessment of every established hearsay exception, federal or state, but in the present case it is argued only that the hearsay exception applied by Georgia is constitutionally invalid because it does not identically conform to the hearsay exception applicable to conspiracy trials in the federal courts. Appellee does not challenge and we do not question the validity of the coconspirator exception applied in the federal courts.

That the two evidentiary rules are not identical must be readily conceded. It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise. *Lutwak* v. *United States*, 344 U. S. 604; *Krulewitch* v. *United States*, 336 U. S. 440. The hearsay exception that Georgia applied in the present case, on the other hand, permits the introduction of evidence of such an out-of-court statement even though made during the concealment phase of the conspiracy.

But it does not follow that because the federal courts have declined to extend the hearsay exception to include out-of-court statements made during the concealment phase of a conspiracy, such an extension automatically violates the Confrontation Clause. Last Term in *California* v. *Green*, 399 U. S. 149, we said:

> "Our task in this case is not to decide which of these positions, purely as a matter of the law of evidence, is the sounder. The issue before us is the considerably narrower one of whether a defendant's constitutional right 'to be confronted with the wit-

nesses against him' is necessarily inconsistent with a State's decision to change its hearsay rules . . . . While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." *Id.*, at 155–156 (citations and footnote omitted).

These observations have particular force in the present case. For this Court has never indicated that the limited contours of the hearsay exception in federal conspiracy trials are required by the Sixth Amendment's Confrontation Clause. To the contrary, the limits of this hearsay exception have simply been defined by the Court in the exercise of its rule-making power in the area of the federal law of evidence.[13] It is clear that the limited scope of the hearsay exception in federal conspiracy trials is a

[13] See 18 U. S. C. § 3771. Fed. Rule Crim. Proc. 26 provides:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See *Hawkins v. United States*, 358 U. S. 74.

product, not of the Sixth Amendment, but of the Court's "disfavor" of "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U. S. 391, 404. As *Grunewald*, *Krulewitch*, and other cases in this Court make clear, the evidentiary rule is intertwined not only with the federal substantive law of conspiracy, but also with such related issues as the impact of the statute of limitations upon conspiracy prosecutions.

In the case before us such policy questions are not present. Evans was not prosecuted for conspiracy in the Georgia court, but for the substantive offense of murder.[14] At his trial the State permitted the introduction of evidence under a long-established and well recognized rule of state law.[15] We cannot say that the evidentiary rule applied by Georgia violates the Constitution merely because it does not exactly coincide with the hearsay exception applicable in the decidedly different context of a federal prosecution for the substantive offense of conspiracy.

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[14] We are advised that at the time of Evans' trial Georgia did not recognize conspiracy as a separate, substantative criminal offense.

[15] The Georgia rule is hardly unique. See, *e. g.*, *Reed* v. *People*, 156 Col. 450, 402 P. 2d 68; *Dailey* v. *State*, 233 Ala. 384, 171 So. 729; *State* v. *Roberts*, 95 Kan. 280, 147 P. 828. See also 2 Wharton, Criminal Evidence § 430 (12th ed. 1955):

"The acts and declarations of a conspirator are admissible against a co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense but also its subsequent concealment. . . . The theory for the admission of such evidence is that persons who conspire to commit a crime, and who do commit a crime, are as much concerned, after the crime, with their freedom from apprehension, as they were concerned, before the crime, with its commission: the conspiracy to commit the crime devolves after the commission thereof into a conspiracy to avoid arrest and implication."

The existence of such a hearsay exception in the evidence law of many States was recognized in *Krulewitch*, *supra*. 336 U. S., at 444.

II

It is argued, alternatively, that in any event Evans' conviction must be set aside under the impact of our recent decisions that have reversed state court convictions because of the denial of the constitutional right of confrontation. The cases upon which the appellee Evans primarily relies are *Pointer* v. *Texas, supra; Douglas* v. *Alabama, supra; Brookhart* v. *Janis, supra; Barber* v. *Page, supra;* and *Roberts* v. *Russell, supra.*

In the *Pointer* case it appeared that a man named Phillips had been the victim of a robbery in Texas. At a preliminary hearing, Phillips "as chief witness for the State gave his version of the alleged robbery in detail, identifying petitioner as the man who had robbed him at gunpoint." 380 U. S., at 401. Pointer had no lawyer at this hearing and did not try to cross-examine Phillips. At Pointer's subsequent trial the prosecution was permitted to introduce the transcript of Phillips' testimony given at the preliminary hearing. Thus, as this Court held, the State's "use of the transcript of that statement at the trial denied petitioner any opportunity to have the benefit of counsel's cross-examination of the principal witness against him." 380 U. S., at 403. The *Douglas* case, decided the same day as *Pointer,* involved an even more flagrant violation of the defendant's right of confrontation. For at Douglas' trial the prosecutor himself was permitted to read an "entire document" purporting to be an accomplice's written confession after the accomplice had refused to testify in reliance upon his privilege against compulsory self-incrimination. "The statements from the document as read by the Solicitor recited in considerable detail the circumstances leading to and surrounding the alleged crime; of crucial importance, they named the petitioner as the person who fired the shotgun blast which wounded the victim." 380

U. S., at 417. In reversing Douglas' conviction, this Court pointed out that the accomplice's reliance upon the privilege against compulsory self-incrimination "created a situation in which the jury might improperly infer both that the statement had been made and that it was true." 380 U. S., at 419. Yet, since the prosecutor was "not a witness, the inference from his reading that [the accomplice] made the statement could not be tested by cross-examination. Similarly, [the accomplice] could not be cross-examined on a statement imputed to but not admitted by him." *Ibid.*

Brookhart v. *Janis* and *Barber* v. *Page* are even further afield. In *Brookhart* it appeared that the petitioner had been "denied the right to cross-examine at all any witnesses who testified against him," and that, additionally, "there was introduced as evidence against him an alleged confession, made out of court by one of his codefendants . . . who did not testify in court." 384 U. S., at 4. The only issue in the case was one of waiver, since the State properly conceded that such a wholesale and complete "denial of cross-examination without waiver . . . would be constitutional error of the first magnitude . . . ." 384 U. S., at 3. In *Barber* the "principal evidence" against the petitioner was a transcript of preliminary hearing testimony admitted by the trial judge under an exception to the hearsay rule that, by its terms, was applicable only if the witness was "unavailable." This hearsay exception "has been explained as arising from necessity . . . ." 390 U. S., at 722, and we decided only that Oklahoma could not invoke that concept to use the preliminary hearing transcript in that case without showing "a good-faith effort" to obtain the witness' presence at the trial. *Id.*, at 725.

In *Roberts* v. *Russell* we held that the doctrine of *Bruton* v. *United States*, 391 U. S. 123, was applicable to the States and was to be given retroactive effect. But

Bruton was a case far different from the one now before us. In that case there was a joint trial of the petitioner and a codefendant, coincidently named Evans, upon a charge of armed postal robbery. A postal inspector testified that Evans had confessed to him that Evans and the petitioner had committed the robbery. This evidence was, concededly, wholly inadmissible against the petitioner. Evans did not testify. Although the trial judge instructed the jury to disregard the evidence of Evans' confession in considering the question of the petitioner's guilt, we reversed the petitioner's conviction. The primary focus of the Court's opinion in *Bruton* was upon the issue of whether the jury in the circumstances presented could reasonably be expected to have followed the trial judge's instructions. The Court found that "[t]he risk of prejudice in petitioner's case was even more serious than in *Douglas*," because "the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." 391 U. S., at 127, 135–136. Accordingly, we held that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." 391 U. S., at 137. There was not before us in *Bruton* "any recognized exception to the hearsay rule," and the Court was careful to emphasize that "we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." 391 U. S., at 128, n. 3.

It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.[16] But this Court has never equated

[16] It has been suggested that the constitutional provision is based on a common law principle that had its origin in a reaction to abuses at the trial of Sir Walter Raleigh. Heller, The Sixth Amendment 104 (1951).

the two, and we decline to do so now.[17] We confine ourselves, instead, to deciding the case before us.

This case does not involve evidence in any sense "crucial" or "devastating," as did all the cases just discussed. It does not involve the use, or misuse, of a confession made in the coercive atmosphere of official interrogation, as did *Douglas*, *Brookhart*, *Bruton*, and *Roberts*. It does not involve any suggestion of prosecutorial misconduct or even negligence, as did *Pointer*, *Douglas*, and *Barber*. It does not involve the use by the prosecution of a paper transcript, as did *Pointer*, *Brookhart*, and *Barber*. It does not involve a joint trial, as did *Bruton* and *Roberts*. And it certainly does not involve the wholesale denial of cross-examination, as did *Brookhart*.

In the trial of this case no less than 20 witnesses appeared and testified for the prosecution. Evans' counsel was given full opportunity to cross-examine every one of them. The most important witness, by far, was the eye witness who described all the details of the triple murder and who was cross-examined at greath length. Of the 19 other witnesses, the testimony of but a single one is at issue here. That one witness testified to a brief conversation about Evans he had had with a fellow prisoner in the Atlanta Penitentiary. The witness was

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[17] See Confrontation and the Hearsay Rule, 75 Yale L. J. 1434: "Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well." *Id.*, at 1436. (Footnotes omitted.)

vigorously and effectively cross-examined by defense counsel.[18] His testimony, which was of peripheral significance at most, was admitted in evidence under a coconspirator exception to the hearsay rule long established under state statutory law. The Georgia statute can obviously have many applications consistent with the Confrontation Clause, and we conclude that its application in the circumstances of this case did not violate the Constitution.

Evans was not deprived of any right of confrontation on the issue of whether Williams actually made the statement related by Shaw. Neither a hearsay nor a confrontation question would arise had Shaw's testimony been used to prove merely that the statement had been made. The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard.[19]

The confrontation issue arises because the jury was being invited to infer that Williams had implicitly identified Evans as the perpetrator of the murder when he blamed Evans for his predicament. But we conclude that there was no denial of the right to confrontation as

[18] This cross-examination was such as to cast serious doubt on Shaw's credibility and, more particularly, on whether the conversation which Shaw related ever took place.

[19] Of course Evans had the right to subpoena witnesses, including Williams, whose testimony might show that the statement had not been made. Counsel for Evans informed us at oral argument that he could have subpoenaed Williams but had concluded that his course would not be in the best interests of his client.

to this question of identity. First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." *California* v. *Green*, 399 U. S., at 161. Evans exercised, and exercised effectively, his right to confrontation on the factual question whether Shaw had actually heard Williams make the statement Shaw related. And the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal.

Almost 40 years ago, in *Snyder* v. *Massachusetts*, 291 U. S. 97, Mr. Justice Cardozo wrote an opinion for this Court refusing to set aside a state criminal conviction because of the claimed denial of the right of confrontation. The closing words of that opinion are worth repeating here:

> "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free." 291 U. S. 122.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for consideration of the other issues presented in this habeas corpus proceeding.[20]

It is so ordered.

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[20] It was conceded at oral argument that the death penalty imposed in this case cannot be carried out, because the jury was qualified under standards violative of *Witherspoon* v. *Illinois*, 391 U. S. 510. The Court of Appeals for the Fifth Circuit has already set aside, under *Witherspoon*, the death sentence imposed upon Venson Williams, Evan's alleged accomplice. See *Williams* v. *Dutton*, 400 F. 2d 797, 804–805.

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[December 15, 1970]

Mr. Justice Blackmun, whom The Chief Justice joins, concurring.

I join Mr. Justice Stewart's opinion. For me, however, there is an additional reason for the result.

The single sentence attributed in testimony by Shaw to Williams about Evans, and which has prolonged this litigation, was, in my view and in the light of the entire record, harmless error if it was error at all. Furthermore, the claimed circumstances of its utterance are so incredible that the testimony must have hurt, rather than helped, the prosecution's case. On this ground alone, I could be persuaded to reverse and remand.

Shaw testified that Williams made the remark at issue when Shaw "went to his room in the hospital" and asked Williams how he made out at a court hearing on the preceding day. On cross-examination, Shaw stated that he was then in custody at the federal penitentiary in Atlanta; that he worked as a clerk in the prison hospital; that Williams was lying on the bed in his room and facing the wall; that he, Shaw, was in the hall and not in the room when he spoke with Williams; that the door to the room "was closed"; that he spoke through an opening about 10 inches square; that the opening "has a piece of plate glass, window glass, just ordinary window glass, and a piece of steel mesh"; that this does not impede talking through the door; and that one talks in a normal voice when he talks through that door.

Shaw conceded that when he had testified at Williams' earlier trial, he made no reference to the glass in the opening in the door.

Carmen David Mabry, called by the State, testified that he was with the United States Public Health Service and stationed at the Atlanta penitentiary. He described the opening in the door to Williams' room and said that it contained a glass "and over that is a wire mesh, heavy steel mesh"; that he has "never tried to talk through the door"; that, to his knowledge, he has never heard "other people talking through the door"; that, during his 11 years at the hospital, the glass has not been out of the door; and that the hospital records disclosed that it had not been out.

I am at a loss to understand how any normal jury, as we must assume this one to have been, could be led to believe, let alone be influenced by, this astonishing account by Shaw of his conversation with Williams in a normal voice through a closed hospital room door. I note, also, the Fifth Circuit's description of Shaw's testimony as "somewhat incredible" and as possessing "basic incredibility." 400 F. 2d, at 828 n. 4.

In saying all this, I am fully aware that the Fifth Circuit panel went on to observe, in the footnote just cited, "[W]e are convinced that it cannot be called harmless." And Justice Quillian, in sole dissent on the direct appeal to the Supreme Court of Georgia, stated, "[I]t obviously was prejudicial to the defendant." 222 Ga., at 408; 150 S. E. 2d, at 251. However, neither the Georgia Superior Court judge who tried the case nor the federal district judge who held the hearing on Evans' petition for federal habeas concluded that prejudicial error was present. Also, we do not know the attitude of the Georgia Supreme Court majority, for they decided the issue strictly upon the pronounced limits

of the long established Georgia hearsay rule, 222 Ga., at 402; 150 S. E. 2d, at 248, and presumably had no occasion to touch upon any alternative ground such as harmlessness. I usually would refrain from passing upon an issue of this kind adversely to a federal court of appeals, but when the trial judges do not rule, I would suppose that we are as free to draw upon the cold record as is the appellate court.

I add an observation about corroboration. Marion Calvin Perry, another federal prisoner and one who admitted numerous past convictions, including "larceny of automobiles," testified without objection that he had known Williams and Evans for about 10 years, and Truett for about two years; that he spoke with Williams and Evans some 25 or 30 days prior to the murders of the three police officers; that Williams owed him money; that he and Williams talked by telephone "[a]bout me stealing some cars for him"; that Williams told him that "Alex [Evans] would know what kind of car he [Williams] would want"; that a few days later "me and Alex talked about cars and I told him I didn't want to mess with Venson [Williams]"; that Evans said, "if I got any, he said I could get them for him"; that seven or eight days before the murders Williams asked him by telephone whether he, Perry, "still had the Oldsmobile switch"; that the week of the murders he argued with Evans about how much he should receive for each stolen car; that six days after the murders he saw Evans at a filling station; that they talked about the murders; that "I said if I wanted to know who did it, I would see mine and your friend"; and that Evans "got mad as hell" and "told me if I thought I knowed anything about it to keep my damn mouth shut."

Another witness, Lawrence H. Hartman, testified that his 1963 red Oldsmobile hardtop was stolen from his home in Atlanta the night of April 16, 1964 (the murders

took place on the early morning of April 17). He went on to testify that the 1963 Oldsmobile found burning near the scene of the tragedy was his automobile. There is testimony in the record as to the earlier acquisition by Evans and Williams of another wrecked Oldsmobile of like model and color; as to the towing of that damaged car by a wrecker manned by Williams and Evans; and as to the replacement of good tires on a Chevrolet occupied by Williams, Evans, and Truett, with recapped tires then purchased by them.

This record testimony, it seems to me, bears directly and positively on the Williams-Evans-Truett car stealing conspiracy and accomplishments and provides indisputable confirmation of Evans' role. The requirements of the Georgia corroboration rule were fully satisfied and Shaw's incredible remark fades into practical and legal insignificance.

The error here, if one exists, is harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U. S. 18, 21–25; *Harrington* v. *California*, 395 U. S. 250.

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Mr. Justice Harlan, concurring in the result.

Not surprisingly the difficult constitutional issue presented by this case has produced multiple opinions. Mr. Justice Stewart finds Shaw's testimony admissible because it is "wholly unreal" to suggest that cross-examination would have weakened the effect of Williams' statement on the jury's mind. Mr. Justice Blackmun, while concurring in this view, finds admission of the statement to be harmless, seemingly because he deems Shaw's testimony so obviously fabricated that no normal jury would have given it credence. Mr. Justice Marshall answers both suggestions to my satisfaction, but he then adopts a position which I cannot accept. He apparently would prevent the prosecution from introducing any out-of-court statement of an accomplice unless there is an opportunity for cross-examination, and this regardless of the circumstances in which the statement was made and regardless of whether it is even hearsay.

The difficulty of this case arises from the assumption that the core purpose of the Confrontation Clause of the Sixth Amendment is to prevent overly broad exceptions to the hearsay rule. I believe this assumption to be wrong. Contrary to things as they appeared to me last Term when I wrote in *California* v. *Green*, 399 U. S.

149, 172 (1970), I have since become convinced that Wigmore states the correct view when he says:

> "The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed—*i. e.* a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially." 5 J. Wigmore, Evidence § 1397, at 131 (3d ed. 1940) (footnote omitted).

The conversion of a clause intended to regulate trial procedure into a threat to much of the existing law of evidence and to future developments in that field is not an unnatural shift, for the paradigm evil the Confrontation Clause was aimed at—trial by affidavit [1]—can be viewed almost equally well as a gross violation of the rule against hearsay and as the giving of evidence by the affiant out of the presence of the accused and not subject to cross-examination by him. But however natural the shift may be, once made it carries the seeds of great mischief for enlightened development in the law of evidence.

If one were to translate the Confrontation Clause into language in more common use today, it would read "In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him." Nothing in this language or in its 18th-century equivalent would connote a purpose to control the scope of the rules of evidence. The language is

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[1] See *California* v. *Green*, *supra*, at 179 (concurring opinion): historically, "the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trial by anonymous accusers, and absentee witnesses."

particularly ill-chosen if what was intended was a prohibition on the use of any hearsay—the position toward which my Brother MARSHALL is being driven, although he does not quite yet embrace it.

Nor am I now content with the position I took in concurrence in *California* v. *Green*, *supra*, that the Confrontation Clause was designed to establish a preferential rule, requiring the prosecutor to avoid the use of hearsay where it is reasonably possible for him to do so—in other words, to produce available witnesses. Further consideration in the light of facts squarely presenting the issue, as *Green* did not, has led me to conclude that this is not a happy intent to be attributed to the Framers absent compelling linguistic or historical evidence pointing in that direction. It is common ground that the historical understanding of the clause furnishes no solid guide to adjudication.[2]

A rule requiring production of available witnesses would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant. Examples which come to mind are the Business Records Act, 28 U. S. C. §§ 1732–1733 (1964), and the exceptions to the hearsay rule for official statements, learned treatises, and trade reports. See, *e. g.*, Uniform Rules of Evidence Rules 63 (15), 63 (30), 63 (31); *Gilstrap* v. *United States*, 389 F. 2d 6 (CA5 1968) (business records); *Kay* v. *United States*, 255 F. 2d 476 (CA4 1958) (laboratory analysis). If the hearsay exception involved in a given case is such as to commend itself to reasonable men, production of the declarant is likely to be difficult, unavailing, or pointless. In unusual cases, of which the

[2] See *California* v. *Green*, *supra*, at 175—179, especially 176 n. 3 (concurring opinion).

case at hand may be an example, the Sixth Amendment guarantees federal defendants the right of compulsory process to obtain the presence of witnesses, and in *Washington* v. *Texas*, 388 U. S. 14 (1967), this Court held that the Fourteenth Amendment extends the same protection to state defendants.[3]

Regardless of the interpretation one puts on the words of the Confrontation Clause, the clause is simply not well designed for taking into account the numerous factors which must be weighed in passing on the appropriateness of rules of evidence. The failure of the plurality opinion to explain the standard by which it tests Shaw's statement, or how this standard can be squared with the seemingly absolute command of the clause, bears witness to the fact that the clause is being put to work for which it is not suited. The task is far more appropriately performed under the aegis of the Fifth and Fourteenth Amendments' commands that federal and state trials, respectively, must be conducted in accordance with due process of law. It is by this standard that I would test federal and state rules of evidence.[4]

It must be recognized that not everything which has been said in this Court's cases is consistent with this

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[3] Although the fact is not necessary to my conclusion, I note that counsel for Evans conceded at oral argument that he could have secured Williams' presence to testify, but decided against it. Transcript of Argument 51, 55.

[4] Reliance on the Due Process Clauses would also have the virtue of subjecting rules of evidence to constitutional scrutiny in civil and criminal trials alike. It is exceedingly rare for the common law to make admissibility of evidence turn on whether the proceeding is civil or criminal in nature. See 1 Wigmore, *supra*, § 4, at 16–17. This feature of our jurisprudence is a further indication that the Confrontation Clause, which applies only to criminal prosecutions, was never intended as a constitutional standard for testing rules of evidence.

position. However this approach is not necessarily inconsistent with the results which have been reached. Of the major "confrontation" decisions of this Court, seven involved the use of prior recorded testimony.[5] In the absence of countervailing circumstances, introduction of such evidence would be an affront to the core meaning of the Confrontation Clause. The question in each case, therefore, was whether there had been adequate "confrontation" to satisfy the requirement of the clause. Regardless of the correctness of the results, the holding that the clause was applicable in those situations is consistent with the view of the clause I have taken.

Passing on to the other principal cases, *Dowdell* v. *United States*, 221 U. S. 325, 330 (1911), held that the Confrontation Clause did not prohibit the introduction of "[d]ocumentary evidence to establish collateral facts, admissible under the common law." While this was characterized as an exception to the clause, rather than a problem to which the clause did not speak, the result would seem correct. *Brookhart* v. *Janis*, 384 U. S. 1 (1966), and *Smith* v. *Illinois*, 390 U. S. 129 (1968), involved restrictions on the right to cross-examination or the wholesale denial of that right. *Douglas* v. *Alabama*, 380 U. S. 415 (1965), is perhaps most easily dealt with by viewing it as a case of prosecutorial misconduct. Alternatively, I would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or

[5] *Reynolds* v. *United States*, 98 U. S. 145 (1879); *Mattox* v. *United States*, 156 U. S. 237 (1895); *Motes* v. *United States*, 178 U. S. 458 (1900); *West* v. *Louisiana*, 194 U. S. 258 (1904); *Pointer* v. *Texas*, 380 U. S. 400 (1965); *Barber* v. *Page*, 390 U. S. 719 (1968); *California* v. *Green*, 399 U. S. 149 (1970).

adoption. The exclusion of such evidence dates at least from *Tong's Case*, Kelyng 17, 18–19, 84 Eng. Rep. 1061, 1062 (K. B. 1663), and is universally accepted. This theory would be adequate to account for the results of both *Douglas* and *Bruton* v. *United States*, 391 U. S. 123 (1968).

The remaining confrontation case of significance is *Kirby* v. *United States*, 174 U. S. 47 (1899). In that case a record of conviction of three men for theft was introduced at Kirby's trial. The judge instructed the jury that this judgment was prima facie evidence that the goods which Kirby was accused of receiving from the three men were in fact stolen. This Court reversed, holding that since the judgment was the sole evidence of the fact of theft, Kirby had been denied his right of confrontation. In my view this is not a confrontation case at all, but a matter of the substantive law of judgments. Accord, 4 Wigmore, *supra*, § 1079, at 133. Indeed, the *Kirby* Court indicated that lack of confrontation was not at the heart of its objection when it said that the record would have been competent evidence of the fact of conviction. The correctness of the result in *Kirby* can hardly be doubted, but it was, I think, based on the wrong legal theory.

Judging the Georgia statute here challenged by the standards of due process, I conclude that it must be sustained. Accomplishment of the main object of a conspiracy will seldom terminate the community of interest of the conspirators. Declarations against that interest evince some likelihood of trustworthiness. The jury, with the guidance of defense counsel, should be alert to the obvious dangers of crediting such testimony. As a practical matter, unless the out-of-court declaration can be proved by hearsay evidence, the facts it reveals are likely to remain hidden from the jury by the declarant's invoca-

tion of the privilege against self-incrimination.[6] In light of such considerations, a person weighing the necessity for hearsay evidence of the type here involved against the danger that a jury will give it undue credit might reasonably conclude that admission of the evidence would increase the likelihood of just determinations of truth. Appellee has not suggested that Shaw's testimony possessed any peculiar characteristic that would lessen the force of these general considerations and require, as a constitutional matter, that the trial judge exercise residual discretion to exclude the evidence as unduly inflammatory. Exclusion of such statements, as is done in the federal courts, commends itself to me, but I cannot say that it is essential to a fair trial. The Due Process Clause requires no more.

On the premises discussed in this opinion, I concur in the reversal of the judgment below.

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[6] Quite apart from *Malloy* v. *Hogan*, 378 U. S. 1 (1964), Georgia has long recognized the privilege. The Georgia Constitution of 1877, Art. I, § 1, ¶ VI, provided that "No person shall be compelled to give testimony tending in any manner to criminate himself," and the same language appears in the present state constitution. Ga. Const. of 1945, Art. I, § 1, ¶ VI. The right had previously been recognized as a matter of common law, even in civil trials. See, *e. g.*, *Marshall* v. *Riley*, 7 Ga. 367 (1849).

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Mr. Justice Marshall, whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan join, dissenting.

Appellee Evans was convicted of first degree murder after a trial in which a witness named Shaw was allowed to testify, over counsel's strenuous objection, about a statement he claimed was made to him by Williams, an alleged accomplice who had already been convicted in a separate trial.[1] According to Shaw, the statement, which implicated both Williams and Evans in the crime, was made in a prison conversation immediately after Williams' arraignment. Williams neither testified nor was called as a witness. Nevertheless, the Court today holds that admission of the extrajudicial statement attributed to an alleged partner in crime did not deny Evans the right "to be confronted with the witnesses against him" guaranteed by the Sixth and Fourteenth Amendments to the Constitution. In so doing, the majority reaches a result completely inconsistent with recent opinions of this Court, especially *Douglas* v. *Alabama*, 380 U. S. 415 (1965), and *Bruton* v. *United States*, 391 U. S. 123 (1968). In my view, those cases fully apply here and establish a clear violation of Evans' constitutional rights.

[1] Shaw had been a witness at Williams' trial; his testimony was fully anticipated and was objected to both before and after its admission.

In *Pointer* v. *Texas*, 380 U. S. 400 (1965), this Court first held that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." That decision held constitutionally inadmissible a statement offered against a defendant at a state trial where the statement was originally made at a preliminary hearing under circumstances not affording the defendant an adequate opportunity for cross-examination. Indeed, we have since held that even cross-examination at a prior hearing does not satisfy the confrontation requirement, at least where the witness who made the statement is available to be called at trial. *Barber* v. *Page*, 390 U. S. 719 (1968). "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Id.*, at 725.

In *Douglas* v. *Alabama*, *supra*, this Court applied the principles of *Pointer* to a case strikingly similar to this one. There, as here, the State charged two defendants with a crime and tried them in separate trials. There, as here, the State first prosecuted one defendant (Loyd) and then used a statement by him in the trial of the second defendant (Douglas). Although the State called Loyd as a witness, an appeal from his conviction was pending and he refused to testify on the ground that doing so would violate his Fifth Amendment privilege against self-incrimination.

Without reaching the question whether the privilege was properly invoked,[2] the Court held that the prosecu-

[2] This same question—which presents a fundamental conflict between a defendant's Sixth Amendment rights and a witness' Fifth Amendment privilege—might have been present here had the State called Williams to testify. Under a view that would make availability of a declarant the only concern of confrontation, see *Cali-*

tor's reading of Loyd's statement in a purported attempt to refresh his memory denied Douglas' right to confrontation. "Loyd could not be cross-examined on a statement imputed to but not admitted by him." 380 U. S., at 419. Of course, Douglas was provided the opportunity to cross-examine the officers who testified regarding Loyd's statement. "But since their evidence tended to show only that Loyd made the confession, cross-examination of them . . . could not substitute for cross-examination of Loyd to test the truth of the statement itself." [3] *Id.*, at 420. Surely, the same reasoning compels the exclusion of Shaw's testimony here. Indeed, the only significant difference between *Douglas* and this case, insofar as the denial of the opportunity to cross-examine is concerned, is that here the State did not even attempt to call Williams to testify in Evans' trial. He was plainly available to the State, and for all we know he would have willingly testified, at least with regard to his alleged conversation with Shaw.[4]

Finally, we have applied the reasoning of *Douglas* to hold that, "despite instructions to the jury to disregard the implicating statements in determining the codefendant's guilt or innocence, admission at a joint trial of a

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fornia v. *Green*, 399 U. S. 149, 172–189 (1970) (HARLAN, J., concurring), the State's right or duty to compel a codefendant's testimony, by timing of trials and use of testimonial immunity, would seemingly have to be decided. See Note, Exercise of the Privilege Against Self-Incrimination by Witnesses and Codefendants: The Effect Upon the Accused, 33 U. Chi. L. Rev. 151, 165 (1965).

[3] Cf. *Brookhart* v. *Janis*, 384 U. S. 1, 4 (1966).

[4] The majority comments that Evans might have brought Williams to the courthouse by subpoena. Defense counsel did not do so, believing that Williams would stand on his right not to incriminate himself. Trans. Oral Arg., O. T. 1970, at 55. Be that as it may, it remains that the duty to confront a criminal defendant with the witnesses against him falls upon the *state*, and here the State was allowed to introduce damaging evidence without running the risks of trial confrontation. Cf. n. 2, *supra*.

defendant's extrajudicial confession implicating a codefendant violated the codefendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Roberts* v. *Russell*, 392 U. S. 293 (1968), giving retroactive effect in both state and federal trials to *Bruton* v. *United States*, 391 U. S. 123 (1968). Thus Williams' alleged statement, an extrajudicial admission made to a fellow prisoner, could not even have been introduced against Williams if he had been tried in a joint trial with Evans.

The teaching of this line of cases seems clear: Absent the opportunity for cross-examination, testimony about the incriminating and implicating statement allegedly made by Williams was constitutionally inadmissible in the trial of Evans.

MR. JUSTICE STEWART's opinion for the plurality for reversal characterizes as "wholly unreal" the possibility that cross-examination of Williams himself would change the picture presented by Shaw's account. A trial lawyer might well doubt, as an article of the skeptical faith of that profession, such a categorical prophecy about the likely results of careful cross-examination. Indeed, the facts of this case clearly demonstrate the necessity for fuller factual development which the corrective test of cross-examination makes possible. The plurality pigeonholes the out-of-court statement that was admitted in evidence as a "spontaneous" utterance, hence to be believed. As the Court of Appeals concluded, however, there is great doubt that Williams even made the statement attributed to him.[5] Moreover, there remains the further question what, if anything, Williams might have meant by the remark that

[5] After considering Shaw's testimony and other evidence submitted at the trial, the Court of Appeals concluded that Shaw's account of his conversation with Williams was notable for "its basic incredibility." 400 F. 2d 826, 828 n. 4.

Shaw recounted. The plurality concedes that the remark is ambiguous. Plainly it stands as an accusation of some sort: "If it hadn't been for . . . Evans," said Williams, according to Shaw, "we wouldn't be in this now." At his trial Evans himself gave unsworn testimony to the effect that the murder prosecution might have arisen from enmities which Evans' own law enforcement activities had stirred up in the locality. Did Williams' accusation relate to Evans as a man with powerful and unscrupulous enemies, or Evans as a murderer? The plurality opts for the latter interpretation, for it concludes that Williams' remark was "against his penal interest" and hence to be believed. But at this great distance from events, no one can be certain. The point is that absent cross-examination of Williams himself, the jury was left with only the unelucidated, apparently damning, and patently damaging accusation as told by Shaw.

Thus we have a case with all the unanswered questions which the confrontation of witnesses through cross-examination is meant to aid in answering: what did the declarant say, and what did he mean, and was it the truth? If Williams had testified and been cross-examined, Evans' counsel could have fully explored these and other matters. The jury then could have evaluated the statement in the light of Williams' testimony and demeanor. As it was, however, the State was able to use Shaw to present the damaging evidence and thus to avoid confronting Evans with the person who allegedly gave witness against him. I had thought that this was precisely what the Confrontation Clause as applied to the States in *Pointer* and our other cases prevented.

Although the opinion of the plurality for reversal concludes that there was no violation of Evans' right to confrontation, it does so in the complete absence of authority or reasoning to explain that result. For exam-

ple, such facts as that Williams' alleged statement was not made during official interrogation, was not in transcript form, and was not introduced in a joint trial—though they differentiate some of the cases—are surely irrelevant. Other cases have presented each of these factors,[6] and no reason is offered why the right to confrontation could be so limited.

Nor can it be enough that the statement was admitted in evidence "under a long established and well recognized rule of state law." The prevailing plurality surely does not mean that a defendant's constitutional right to confrontation must give way to a state evidentiary rule. That much is established by our decision in *Barber* v. *Page, supra,* which held unconstitutional the admission of testimony in accordance with a rule similarly well recognized and long established. However, the plurality neither succeeds in distinguishing that case nor considers generally that there are inevitably conflicts between *Pointer* and state evidentiary rules. Rather, it attempts to buttress its conclusion merely by announcing a reluctance to equate evidentiary hearsay rules and the Confrontation Clause.[7]

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[6] For example, *Pointer* involved only the second, and that one was not present in either *Bruton* or *Roberts*.

[7] Constitutionalization of "all common-law hearsay rules and their exceptions," *California* v. *Green*, 399 U. S., at 174 (concurring opinion), would seem to be a prospect more frightening than real. Much of the complexity afflicting hearsay rules comes from the definition of hearsay as an out-of-court statement presented for the truth of the matter stated—a definition nowhere adopted by this Court for confrontation purposes. Rather, the decisions, while looking to availability of a declarant, *Barber* v. *Page, supra,* recognize that "cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him," *Pointer* v. *Texas*, 380 U. S., at 404, and that admission in the absence of cross-examination of certain types of suspect and highly damaging statements is one of the "threats to a fair trial" against which "the Confrontation Clause was directed," *Bruton* v. *United States*, 391 U. S., at 136.

The Court of Appeals, however, was not of the view that the Confrontation Clause implies unrelenting hostility to whatever evidence may be classified as hearsay. Nor did that court hold that States must conform their evidentiary rules to the hearsay exceptions applicable in federal conspiracy trials. While it did note that this case does not in reality even involve the traditional hearsay rule and its so-called co-conspirators exception,[8] that was not the basis for its decision. Rather, the Court of Appeals found in the admission of an incriminatory and inculpating statement attributed to an alleged accomplice who was not made available for cross-examination what it termed an obvious abridgment of Evans' right to confrontation. Since the State presented no satisfactory justification for the denial of confrontation, cf. *Pointer* v. *Texas*, 380 U. S., at 407, the Court of Appeals held that under *Douglas* v. *Alabama* and this Court's other cases Evans was denied his constitutional rights.

Surely the Constitution requires at least that much when the State denies a defendant the right to confront and cross-examine the witnesses against him in a crim-

[8] Evans was not charged with conspiracy nor could he have been under Georgia law. The "conspiracy" element came in as part of the State's evidentiary law, part of which goes far beyond the traditional hearsay exception even as it exists with regard to the "concealment phase" in some jurisdictions. Indeed, Williams' alleged statement itself negates the notion that Evans had authorized Williams to speak or had assumed the risk in order to achieve an unlawful aim through concert of effort. It is difficult to conceive how Williams could be part of a conspiracy to conceal the crime when all the alleged participants were in custody and he himself had already been arraigned. As this Court stated in *Fiswick* v. *United States*, 329 U. S. 211, 217 (1946), an "admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it." One lower court in Georgia has adopted essentially this reasoning in reversing a conviction where testimony similar to that objected to in this case was admitted. See *Green* v. *State*, 115 Ga. App. 685, 155 S. E. 2d 655 (1967). But see n. 9, *infra*.

inal trial. In any case, that Shaw's testimony was admitted in accordance with an established rule of state law cannot aid the prevailing plurality in reaching its conclusion. Carried to its logical end, justification of a denial of the right to confrontation on that basis would provide for the wholesale avoidance of this Court's decisions in *Douglas* and *Bruton*,[9] decisions which the plurality itself reaffirms. Indeed, if the prevailing opinion meant what it says, it would come very close to establishing in reverse the very equation it seeks to avoid—an equation that would give any exception to a state hearsay rule a "permanent niche in the Constitution" in the form of an exception to the Confrontation Clause as well.

Finally, the prevailing opinion apparently distinguishes the present case on the ground that it "does not involve evidence in any sense 'crucial' or 'devastating.'" Despite the characterization of Shaw's testimony as "of peripheral significance at most," however, the possibility of its prejudice to Evans was very real. The outcome of Evans' trial rested, in essence, on whether the jury would believe the testimony of Truett with regard to Evans' role in the murder. Truett spoke as an admitted accomplice who had been immunized from prosecution. Rely-

[9] The Georgia rule involved here, which apparently makes admissible all pre-trial statements and admissions of an alleged accomplice or co-conspirator, inevitably conflicts with this Court's decisions regarding the Confrontation Clause. See *Darden* v. *State*, 172 Ga. 590, 158 S. E. 414 (1931), and *Mitchell* v. *State*, 86 Ga. App. 292, 71 S. E. 2d 756 (1952), where confessions of codefendants not on trial were held admissible. Indeed, the Georgia Supreme Court seems to have resolved this conflict in favor of the state rule by erroneously concluding that this Court's decisions are based on the federal hearsay rule concerning "a confession by one of the co-conspirators after he has been apprehended." *Pinion* v. *State*, 225 Ga. 36, 37, 165 S. E. 2d 708, 709–710 (1969). See also *Park* v. *State*, 225 Ga. 618, 170 S. E. 2d 687 (1969), petition for cert. filed, November 4, 1969, No. 57 O. T. 1970 (renumbered).

ing on Georgia law, not federal constitutional law, the trial judge instructed the jury that "you cannot lawfully convict upon the testimony of an accomplice alone . . . . [T]he testimony of an accomplice must be corroborated . . . . [T]he corroboration . . . must be such as to connect the defendant with the criminal act." The State presented the testimony of a number of other witnesses, in addition to that of the alleged accomplice that tended to corroborate Evans' guilt. But Shaw's account of what Williams supposedly said to him was undoubtedly a part of that corroborating evidence.[10]

Indeed, the prevailing opinion does not itself upset the Court of Appeals' finding that the admission of Shaw's testimony, if erroneous, could not be considered harmless. Beyond and apart from the question of harmless error, MR. JUSTICE STEWART undertakes an inquiry, the purpose of which I do not understand, into whether the evidence admitted is "crucial" or "devastating." The view is, apparently, that to require the exclusion of evidence falling short of that high standard of prejudice would bring a moment of clamor against the Bill of

[10] The trial judge's instructions left no doubt that the statement attributed to Williams could provide the necessary corroboration. See Trial Record, at 412–413. Indeed, the prejudicial impact of Shaw's testimony is graphically revealed simply by juxtaposing two quotations. First, there is the prevailing opinion's characterization of Shaw's testimony, a characterization which I find fair albeit studiedly mild: ". . . the jury was being invited to infer that Williams had implicitly *identified Evans as the perpetrator* of the murder. . . ." (Emphasis added.) Second, there is the trial judge's charge on corroboration of accomplice testimony: "*Slight evidence* from an extraneous source *identifying the accused as a participator in the criminal act* will be sufficient corroboration of an accomplice to support a verdict." (Emphasis added.) In the light of the charge and on consideration of the whole record of Evans' trial, it is impossible for me to believe "beyond a reasonable doubt" that the error complained of did not contribute to the verdict obtained. *Chapman* v. *California*, 386 U. S. 18, 24 (1967); *Harrington* v. *California*, 395 U. S. 250, 251 (1969).

Rights. I would eschew such worries and confine the inquiry to the traditional questions: Was the defendant afforded the right to confront the witnesses against him? And, if not, was the denial of his constitutional right harmless beyond a reasonable doubt?

The fact is that Evans may well have been convicted in part by an incriminatory and implicating statement attributed to an alleged accomplice who did not testify and who consequently could not be questioned regarding the truth or meaning of that statement. The Court of Appeals correctly recognized that the Confrontation Clause prohibits such a result, whether the statement is introduced under the guise of refreshing a witness' recollection as in *Douglas* v. *Alabama*, against a codefendant with a limiting instruction as in *Bruton* v. *United States*, or in accordance with some other evidentiary rule as here.

I am troubled by the fact that the plurality for reversal, unable when all is said to place this case beyond the principled reach of our prior decisions, shifts its ground and begins a hunt for whatever "indicia of reliability" may cling to Williams' remark, as told by Shaw. Whether Williams made a "spontaneous" statement "against his penal interest" is the very question which should have been tested by cross-examination of Williams himself. If "indicia of reliability" are so easy to come by, and prove so much, then it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all in protecting a criminal defendant against the use of extrajudicial statements not subject to cross-examination and not exposed to a jury assessment of the declarant's demeanor at trial.[11] I believe the Con-

[11] MR. JUSTICE HARLAN answers this question with directness by adopting, to decide this case, his view of due process which apparently makes no distinction between civil and criminal trials, and which would prohibit only irrational or unreasonable evidentiary

frontation Clause has been sunk if any out-of-court statement bearing an indicium of a probative likelihood can come in, no matter how damaging the statement may be or how great the need for the truth-discovering test of cross-examination. Cf. *California* v. *Green*, 399 U. S. 149, 161–162 (1970). Our decisions from *Pointer* and *Douglas* to *Bruton* and *Roberts* require more than this meager inquiry. Nor is the lame "indicia" approach necessary to avoid a rampaging Confrontation Clause which tramples all flexibility and innovation in a state's law of evidence. That spectre is only a spectre.[12] To decide this case I need not go beyond hitherto settled Sixth and Fourteenth Amendment law to consider generally what effect, if any, the Confrontation Clause has on the common law hearsay rule and its exceptions, since no issue of such global dimension is presented. Cf. *Bruton* v. *United States*, 391 U. S., at 128 n. 3. The incriminatory extrajudicial statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant, whether or not his statement falls within a genuine exception to the hearsay rule.

In my view, Evans is entitled to a trial in which he is fully accorded his constitutional guarantee of the right to confront and cross-examine all the witnesses against him. I would affirm the judgment of the Court of Appeals and let this case go back to the Georgia courts to be tried without the use of this out-of-court statement attributed by Shaw to Williams.

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rulings. Needless to say, I cannot accept the view that Evans' constitutional rights should be measured by a standard concededly having nothing to do with the Confrontation Clause.

[12] See n. 7, *supra*.